CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 **FEBRUARY 15, 1995** **NO. 7**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

(T.D. 95–12)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JANUARY 1995

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holidays: Monday, January 2, 1995, and Monday, January 16, 1995.

Greece drachma:

January 1, 1995	$0.004159
January 3, 1995	.004146
January 4, 1995	.004124
January 5, 1995	.004146
January 6, 1995	.004126
January 7, 1995	.004126
January 8, 1995	.004126
January 9, 1995	.004165
January 10, 1995	.004176
January 11, 1995	.004186
January 12, 1995	.004208
January 13, 1995	.004183
January 14, 1995	.004183
January 15, 1995	.004183
January 17, 1995	.004195
January 18, 1995	.004201
January 19, 1995	.004216
January 20, 1995	.004239
January 21, 1995	.004239
January 22, 1995	.004239
January 23, 1995	.004244
January 24, 1995	.004242
January 25, 1995	.004234
January 26, 1995	.004240
January 27, 1995	.004231
January 28, 1995	.004231
January 29, 1995	.004231
January 30, 1995	.004261
January 31, 1995	.004207

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1995 (continued):

South Korea won:

January 1, 1995	$0.001262
January 3, 1995	.001263
January 4, 1995	.001263
January 5, 1995	.001262
January 6, 1995	.001262
January 8, 1995	.001262
January 9, 1995	.001260
January 10, 1995	.001259
January 11, 1995	.001259
January 12, 1995	.001261
January 13, 1995	.001261
January 14, 1995	.001261
January 15, 1995	.001261
January 17, 1995	.001257
January 18, 1995	.001258
January 19, 1995	.001257
January 20, 1995	.001257
January 21, 1995	.001257
January 22, 1995	.001257
January 23, 1995	.001257
January 24, 1995	.001257
January 25, 1995	.001261
January 26, 1995	.001265
January 27, 1995	.001268
January 28, 1995	.001268
January 29, 1995	.001268
January 30, 1995	.001266
January 31, 1995	.001266

Taiwan N.T. dollar:

January 1, 1995	$0.038037
January 3, 1995	.038124
January 4, 1995	.038110
January 5, 1995	.037951
January 6, 1995	.038052
January 7, 1995	.038052
January 8, 1995	.038052
January 9, 1995	.037922
January 10, 1995	.037994
January 11, 1995	.037979
January 12, 1995	.038023
January 13, 1995	.037994
January 14, 1995	.037994
January 15, 1995	.037994
January 17, 1995	.038008
January 18, 1995	.038023
January 19, 1995	.038023
January 20, 1995	.038037
January 21, 1995	.038037
January 22, 1995	.038037
January 23, 1995	.038008
January 24, 1995	.038052
January 25, 1995	.038066
January 26, 1995	.038066
January 27, 1995	.038037

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1995 (continued):

Taiwan N.T. dollar (continued):

January 28, 1995	$0.38037
January 29, 1995	.038037
January 30, 1995	.038008
January 31, 1995	.038008

Dated: February 1, 1995.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 95–13)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR JANUARY 1995

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 95–3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holidays: Monday, January 2, 1995, and Monday, January 16, 1995.

Mexico peso:

January 10, 1995	$0.172414
January 24, 1995	.172414
January 30, 1995	.153846
January 31, 1995	.171821

Dated: February 1, 1995.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

19 CFR Part 4

(T. D. 95–14)

ADDITION OF BRAZIL TO THE LIST OF NATIONS ENTITLED TO SPECIAL TONNAGE TAX EXEMPTION

AGENCY: U. S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Pursuant to information provided by the Department of State, the United States Customs Service has found that Brazil no longer imposes discriminating duties of tonnage or imposts upon vessels belonging to citizens of the United States. Accordingly, vessels of Brazil are exempt from special tonnage taxes and light money in ports of the United States. This document amends the Customs Regulations by adding Brazil to the list of nations whose vessels are exempt from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

EFFECTIVE DATE: The reciprocal privileges for vessels registered in Brazil became effective on September 15, 1994. This amendment is effective February 6, 1995.

FOR FURTHER INFORMATION CONTACT: Barbara E. Whiting, Carrier Rulings Branch (202–482–6940).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton, called "light money," on all foreign vessels which enter United States ports (46 U.S.C. App. 121, 128). However, vessels of a foreign nation may be exempted from the payment of special tonnage taxes and light money upon presentation of satisfactory proof that no discriminatory duties of tonnage or impost are imposed by that foreign nation on U. S. vessels or their cargoes (46 U.S.C. App. 141).

Section 4.22, Customs Regulations (19 CFR 4.22), lists those nations whose vessels have been found to be exempt from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money. The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

Brazil was previously included in the list of exempted nations in § 4.22, Customs Regulations (19 CFR 4.22), but the U.S. Department of State informed Customs that U. S. vessels and their cargoes were being charged discriminatory duties in the form of lighthouse fees and a Merchant Marine Renewal Tax by the Government of Brazil. Accordingly,

Brazil was removed from the list of exempted nations by means of a final rule published in the Federal Register on March 5, 1993 (58 FR 12538).

The Department of State now informs Customs that the Government of Brazil has agreed to exempt vessels of the United States from payment of lighthouse fees, effective September 15, 1994. The Government of Brazil also indicated that it has ended rebates of the Merchant Marine Renewal Tax to Brazilian–registered ships, so that duty is no longer b eing applied in a discriminatory manner.

FINDING

On the basis of the above–mentioned information from the Department of State regarding the current absence of discriminatory duties of tonnage or impost imposed upon U. S. vessels in the ports of Brazil, the Customs Service has determined that vessels of Brazil are exempt from the payment of the special tonnage tax and light money, effective September 15, 1994. The Customs Regulations are amended accordingly.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because this amendment merely implements a statutory requirement and confers a benefit upon the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary; further, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1) and (3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*. This amendment does meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Cargo vessels, Customs duties and inspection, Maritime carriers, Vessels.

AMENDMENT TO THE REGULATIONS

Part 4, Customs Regulations (19 CFR Part 4), is amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91.

* * * * * * *

Section 4.22 also issued under 46 U.S.C. App. 121, 128, 141;

* * * * * * *

§ 4.22 [Amended].

2. Section 4.22 is amended by inserting "Brazil" in appropriate alphabetical order.

Dated: January 31, 1995.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, February 6, 1995 (60 FR 6966)]

U.S. Customs Service

General Notices

DATES AND DRAFT AGENDA OF THE ELEVENTH SESSION OF THE HARMONIZED SYSTEM REVIEW SUBCOMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs Service, Department of the Treasury, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the eleventh session of the Harmonized System Review Subcommittee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Review Subcommittee of the World Customs Organization.

DATE: January 31, 1995.

FOR FURTHER INFORMATION CONTACT: Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202–205–2592) or Myles B. Harmon, Director, International Nomenclature Staff, U.S. Customs Service (202–482–7000).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States ("HTSUS"). The Harmonized System Convention is under the jurisdiction of the World Customs Organization ("WCO") (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classifi-

cation decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in Brussels, Belgium.

In order to ensure that the Harmonized System continues to reflect changes in technology and in patterns of international trade, the Harmonized System Review Subcommittee ("RSC") was created as a subcommittee of the HSC. The RSC is responsible for conducting systematic reviews of the Harmonized System on a regular basis in order to assist the HSC in ensuring that the Harmonized System is kept up to date as envisaged by Article 7.1(a) of the Harmonized System Convention. The first general review of the Harmonized System by the RSC was completed in 1993 and will be implemented internationally on January 1, 1996. At its next session, the RSC will begin work on its next general review of the Harmonized System.

The next session of the RSC will be its eleventh, and it will be held from march 6 to March 10, 1995, in Brussels, Belgium.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the U.S. Department of the Treasury, represented by the U.S. Customs Service, the U.S. Department of Commerce, represented by the Bureau of the Census, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. government at the sessions of the HSC and RSC. The Customs Service representative serves as the head of the delegation at the sessions of the HSC. The ITC representative serves as the head of the delegation at the sessions of the RSC.

Set forth below is the draft agenda for the next session of the RSC. Copies of available agenda-item documents may be obtained from either the Customs Service of the ITC. Comments on agenda items may be directed to the above-listed individuals. In addition, proposals for new matters or items for consideration at future sessions of the RSC may be directed to those same individuals.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Attachment: Attachment A]

Attachment A
39.059 E

DRAFT AGENDA FOR THE ELEVENTH SESSION OF THE HARMONIZED SYSTEM REVIEW SUBCOMMITTEE

Opening date: Monday, March 6, 1995 (10 a.m.)

Closing date: Friday, March 10, 1995

I

ADOPTION OF THE AGENDA

Draft Agenda ..... Doc. 39.059

II

TECHNICAL QUESTIONS

A. *Separate Identification of Waste Products in the HS:*

1. Certain specific categories of wastes ..... Doc. 39.146
2. European Community's proposal concerning Chapter 81 ..... Docs. 39.043 (HCS/14) 39.147
3. Proposals by the OECD ..... Doc. 39.148
4. Proposals by the UNEP (Basel Convention Secretariat) ..... Doc. 39.160

B. Amendments Dropped from the 1993 Recommendation on the Basis of Objections:

1. Subheadings 2922.1, 2922.2 and 2922.4 ..... Doc. 39.149

C. *Proposals Outstanding from the Last Review Cycle:*

1. Possible new Subheading for bulgur wheat ..... Docs. 39.151 39.161 39.162
2. Possible new Subheadings for "concentrated juices" ..... Docs. 39.152 39.194

D. *Areas Subject to Frequent Lawsuits or Disputes:*

1. Definition of "put up in packings for retail sale" ..... Doc. 39.153
2. Distinction between sugar confectionary or food supplements and medicaments ..... Doc. 39.154
3. Possible amendment to heading 84.43 to distinguish more easily between the printing machinery of this heading and other printers Doc. 39.155
4. Possible amendment to heading 87.04 concerning the classification of "pick-up" vehicles ..... Doc. 39.156
5. Possible amendment to Note 6 to Chapter 90 to clarify the scope of the expressions "Instruments and apparatus for automatically controlling" and "Automatic regulators" ..... Doc. 39.157

E. *Other:*

1. Possible amendment to Note 2(c) to Section XVI concerning the classification of certain machine parts ..... Doc. 39.158
2. Other

III

GENERAL QUESTIONS

1. Timetable for the current HS Review cycle and some related topics ..... Doc. 39.159
2. Other

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 1–1995)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of December 1994 follow. The last notice was published in the CUSTOMS BULLETIN on December 28, 1994.

Corrections or information to update files may be sent to:

U.S. Customs Service
IPR Branch
1301 Constitution Avenue NW (Franklin Court)
Washington, DC 20229

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: January 31, 1995.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9400320	19941208	20141208	ROBOKID COLLECTION	RUBY INTERNATIONAL, INC.	N
COP9400321	19941214	20141214	PACIFICA COLLECTION DIVISION OF CENTURY LIGHTING	CHENGCORP	N
COP9400322	19941214	20141214	RUMBA	WALL DATA ICORPORATED	N
COP9400323	19941214	20141214	RUMBA GATEWAY SYSTEM VERSION 2.1	WALL DATA ICORPORATED	N
COP9400324	19941215	20141215	LABRADOR PUP	SANDRA A. BRUE	N
COP9400325	19941215	20141215	HAIRDINI	ANGELHAIR LTD.	N
COP9400326	19941215	20141215	HAIRDINI-MAGIC STYLING WAND	ANGELHAIR LTD.	N
COP9400327	19941215	20141215	SPARKSTER (SNES)	KONAMI AMERICA	N
COP9400328	19941215	20141215	CHENGCORP PEACOCK UMBRELLA DESIGN 1992 SERIES I	CHENGCORP	N
COP9400329	19941215	20141215	DESIGN FOR ADDICTION TIES AND BOXERS	BOLERO USA INC.	N
COP9400330	19941215	20141215	HOT DOG CAR	METRO TOY INDUSTRIES CO., LTD.	N
COP9400331	19941215	20141215	FIRE CHIEF ENGINE	METRO TOY INDUSTRIES CO., LTD.	N
COP9400332	19941215	20141215	HOT DOG TRUCK	METRO TOY INDUSTRIES CO., LTD.	N
COP9400333	19941215	20141215	ICE CREAM TRUCK	METRO TOY INDUSTRIES CO., LTD.	N
COP9400334	19941215	20141215	ICE CREAM CAR	METRO TOY INDUSTRIES CO., LTD.	N
SUBTOTAL RECORDATION TYPE		15			
TMK9400788	19941202	19951214	LINDA	TRANSAGRICOLA S.A.	N
TMK9400789	19941215	20040913	ESCENTS LAGUNA	JOSEPH A. SASNICK	N
TMK9400790	19941215	20040205	POLO BY RALPH LAUREN & DESIGN	POLO RALPH CORPORATION	N
TMK9400791	19941215	20070106	GET USED	MAJESTIC WEAR, INC.	Y
TMK9400792	19941215	20031012	MARIE ST. CLAIRE	CARMEN M. VALVO	Y
TMK9400793	19941215	20021220	USED	MAJESTIC WEAR, INC.	Y
TMK9400794	19941215	20000918	CARMEN MARC VALVO	CARMEN M. VALVO	Y
TMK9400795	19941215	20030503	PENGUIN DESIGN	DC COMICS A NEW YORK GENERAL	N
TMK9400796	19941215	20020905	GIVENCHY	PARFUMS GIVENCHY	N
TMK9400797	19941215	20020905	GIVENCHY	PARFUMS GIVENCHY	N
TMK9400798	19941215	19990605	GITANO	GITANO FASHION LIMITED	N
TMK9400799	19941215	20040712	FRENCH SUEDE OPAQUE	DANSKIN INC.	N
TMK9400800	19941215	20040306	M CHARACTER	MARS, INCORPORATED	N
TMK9400801	19941215	20040507	M CHARACTER	MARS, INCORPORATED	N
TMK9400802	19941215	20071208	HOT BEAN PASTE	RHEE BROS., INC.	Y
TMK9400803	19941215	20090418	WILKE-RODRIGUEZ AND DESIGN	TERRY WILKE	Y
TMK9400804	19941215	20031027	SKETCH BOOK BY WILKE-RODRIGUEZ AND DESIGN	TERRY WILKE	Y
TMK9400805	19941216	20010623	PEDIGREE	KAL KAN FOODS, INC.	N
TMK9400806	19941216	20040918	ZIPPO	ZIPPO MANUFACTURING COMPANY	N
SUBTOTAL RECORDATION TYPE		19			
TOTAL RECORDATIONS ADDED THIS MONTH		34			

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 31, 1995.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF "BICART COLUMN" CARTRIDGES FOR KIDNEY DIALYSIS MACHINES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of "BiCart Column" cartridges for kidney dialysis machines. Notice of the proposed revocation was published December 21, 1994, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 17, 1995.

FOR FURTHER INFORMATION CONTACT: David W. Spence, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 21, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 51, proposing to revoke Headquarters Ruling Letter (HQ) 557669, dated March 3, 1994, which held that "BiCart Column" cartridges, which are for use solely with kidney dialysis machines, were classifiable as parts of medical instruments under subheading 9018.90.75, Harmonized Tariff Schedule of the United States (HTSUS), which provides for: "[i]nstruments and appliances used in medical, surgical, dental or veterinary sciences, * * *; parts and

accessories thereof: [o]ther instruments and appliances and parts and accessories thereof: [o]ther: [e]lectro-medical instruments and appliances and parts and accessories thereof: [o]ther: [o]ther." No comments were received pertaining to this issue.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking HQ 557669 to reflect the proper classification of the "BiCart Column cartridges under subheading 2836.30.00, HTSUS, which provides for: "[s]odium hydrogencarbonate (Sodium bicarbonate)." HQ 957022, revoking HQ 557669, is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1).

Dated: January 24, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 24, 1995.

CLA–2 CO:R:C:M 957022 DWS
Category: Classification
Tariff No. 2836.30.00

MS. LYNN S. BAKER
KATTEN MUCHIN & ZAVIS
525 West Monroe Street, Suite 1600
Chicago, IL 60661–3693

Re: Reconsideration of HQ 557669; "BiCart Column" cartridges; sodium bicarbonate; dialysis machines; GRI 5(b); HQs 082357; *Kores Manufacturing Inc. v. U.S.*; 9018.90.75.

DEAR MS. BAKER:

This is in response to your letters of May 10 and October 31, 1994, on behalf of Cobe Laboratories Inc., requesting reconsideration of HQ 557669, dated March 3, 1994, concerning the classification of "BiCart Column" cartridges under the Harmonized Tariff Schedule of the United States (HTSUS). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of HQ 557669 was published December 21, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 51.

Facts:

The merchandise consists of "BiCart Column" cartridges, designed for use solely with dialysis machines. The cartridges are comprised of a specially shaped polypropylene car-

tridge containing 650 grams of sodium bicarbonate powder. They are imported in packages of ten units and are designed for one time use only. When attached to a special holder affixed to the kidney dialysis machine, the cartridge allows "on line" production of the liquid bicarbonate concentrate required for dialysis.

Healthy human kidneys produce bicarbonate, which neutralizes the large quantities of acid produced in the body by cell metabolism. Because persons with renal disease (kidney failure), who require dialysis, are unable to naturally produce bicarbonate, the chemical must be provided through dialysis treatment. The dialysis solution is made up of an electrolyte solution which approximates the concentrate of normal plasma. Most often, the solution produced by the dialysis machine contains five chemical compounds: sodium chloride, sodium bicarbonate, calcium chloride, potassium chloride, and magnesium chloride. Due to the tendency of the bicarbonate and the remaining chemicals to react over time and form magnesium carbonate or limestone, which clogs the dialysis machine, two separate concentrates are used: sodium bicarbonate and acid concentrate. A dual proportioning system contained in the dialysis machine itself continuously mixes the two concentrates as needed during the dialysis procedure to produce a constant supply of free flowing dialysis solution.

Traditionally, bicarbonate concentrate was sold to hospitals in two forms, dry powder or liquid concentrate. With dry powder, the hospital is required to mix it with water to produce the concentrate. Liquid concentrate is heavy and difficult to store. Delivery of bicarbonate concentrate from the powder directly to the dialysis machine helps eliminate the problems associated with these other two forms. This process is achieved by the use of the "BiCart Column" cartridges. Each cartridge snaps into a special holder attached to the dialysis machine. When the cartridge is placed in the special holder, water is drawn from the dialysis machine through the cartridge to produce a saturated sodium bicarbonate solution. The dialysis machine, through its dual proportioning system, then mixes the solution with water and the acid concentrate to produce the dialysis solution.

The subheadings under consideration are as follows:

> 9018.90.75: [i]nstruments and appliances used in medical, surgical, dental or veterinary sciences, * * *; parts and accessories thereof: [o]ther instruments and appliances and parts and accessories thereof: [o]ther: [e]lectro-medical instruments and appliances and parts and accessories thereof: [o]ther: [o]ther.
>
> The general, column one rate of duty for goods classifiable under this provision is 4.2 percent *ad valorem*.
>
> 2836.30.00: [s]odium hydrogencarbonate (Sodium bicarbonate).
>
> Goods classifiable under this provision receive duty-free treatment.

Issue:

Whether the "BiCart Column" cartridges are classifiable under subheading 9018.90.75, HTSUS, as parts of medical instruments, or under subheading 2836.30.00, HTSUS, as sodium bicarbonate.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

In HQ 557669, we held that the sodium bicarbonate cartridges were classifiable under subheading 9018.90.75, HTSUS, as parts of medical instruments.

Sodium bicarbonate is specifically classifiable under subheading 2836.30.00, HTSUS. GRI 5(b) states that:

> [s]ubject to the provisions of rule 5(a) above, packing materials and packing containers entered with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

The cartridges themselves are merely containers for the conveyance and storage of the sodium bicarbonate, even if they are specially shaped in order to be incorporated in a dialysis machine. Goods are almost always transported in some form of container or package. However, even if that package is specially shaped, it does not alter the classification of the good pursuant to GRI 1.

As we stated in HQ 082357, dated November 29, 1989 [a Tariff Schedules of the United States (TSUS) ruling concerning the classification of toner cartridges]:

> [r]ather than a part, the cartridge supplies fuel for the copier, a fuel which is as expendable as any other fuel. As mentioned in T.D. 35151, a completed rifle does not contemplate the cartridges used. So, too, the concept of a photocopier would not necessarily include the toners. The toner enables the machine to produce a printed image on paper, but as the copier is a complete machine without the paper, it is just as complete without the toner.
>
> The toner cartridge represents a minuscule, if not infinitesimal, portion of the cost of the copier. The cartridge is nothing more than a container for fuel which must be constantly replenished.

The "BiCart Column" cartridges are not classifiable under subheading 9018.90.75, HTSUS, as parts of medical instruments. Whether an article is a part of another article depends on the nature of the so-called "part" and its usefulness, function and purpose in relation to the article in which it is designed to serve. *Kores Manufacturing Inc. v. U.S.*, 3 CIT 178, 179 (1982), *aff'd* appeal No. 82–83 (C.A.F.C. 1983).

Counsel has stated that the cartridges are not essential to the operation of the dialysis machine. In fact, the sodium bicarbonate can be added through other, more traditional methods. However, the process is much easier through the use of the cartridges. Similar to the toner cartridge in HQ 082357, the "BiCart Column" cartridges are nothing more than containers of a chemical which must be constantly replenished. The dialysis machine is a complete machine and operates as such with or without the presence of a "BiCart Column" cartridge.

Therefore, in accordance with GRIs 1 and 5(b), the "BiCart Column" cartridges are classifiable under subheading 2836.30.00, HTSUS.

Holding:

The "BiCart Column" cartridges are classifiable under subheading 2836.30.00, HTSUS, as sodium bicarbonate.

HQ 557669, dated March 3, 1994, is hereby revoked. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN M. AMERNICK
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF JETTED BATHS AND WHIRLPOOL SPAS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of jetted baths and whirlpool spas. Notice of the proposed revocation was published December 28, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 52.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 17, 1995.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Metals and Machinery Classification Branch, Office of Regulations and Rulings (202) 482–7063 or 7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 28, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 52, proposing to revoke New York (NY) 839530 dated May 1, 1989, in which the Area Director, New York Seaport, classified jetted baths and whirlpool spas under subheading 3922.10.0000, Harmonized Tariff Schedule of the United States (HTSUS), as baths, shower baths and washbasins. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(C)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY 839530 to reflect the proper classification of the jetted baths and whirlpool spas under subheading 9019.10.20, HTSUS, as mechano-therapy appliance and massage apparatus. The general column one rate of duty is 3.4 percent *ad valorem*. HRL 957383 modifying NY 839530 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 30, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 30, 1995.

CLA–2 CO:R:C:M 957383 KCC
Category: Classification
Tariff No. 9019.10.20

MS. SUSAN E. CARR
C. J. TOWER, INC.
CUSTOMS BROKERS
128 Dearborn Street
Buffalo, NY 14207

Re: NY 839530 revoked; jetted baths and whirlpool spas; 3922.10.00; baths, shower baths and washbasins; Note 2(q), Chapter 90; mechano-therapy appliance and massage apparatus; Note 3, Chapter 90; Note 4, Section XVI; functional unit; NY 871935.

DEAR MS. CARR:

This is in reference to New York (NY) 839530 issued to you on May 1, 1989, on behalf of your client, Ryan Whirlpools, Inc., by the Area Director of Customs, New York Seaport, which concerned the tariff classification of jetted baths and whirlpool spas under the Harmonized Tariff Schedule of the United States (HTSUS). Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter section 625), notice of the proposed revocation of NY 839530 was published December 28, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 52.

Facts:

In NY 839530 dated May 1, 1989, the Area Director, New York Seaport, classified jetted baths and whirl pool spas under subheading 3922.10.00, Harmonized Tariff Schedule of the United States (HTSUS), as baths, shower baths and washbasins. NY 839530 described the articles as follows:

> The merchandise at issue consists of jetted bath tubs and whirlpool spas which are stated to be comprised of the following:
>
> (a) a shell manufactured from cast acrylic sheeting reinforced on its back side with fire retardant fiberglass and resin;
> (b) whirlpool jets made of PVC plastic;
> (c) a spa pack which includes a plastic pump and motor (noting the whirlpool spa pack to possess an in-line electric heater);
> (d) plywood and cedar skirting.

The competing subheadings are as follows:

3922.10.00	Baths, shower baths, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics * * *. Baths, shower baths and washbasins.
9019.10.20	Mechano-therapy appliances; massage apparatus; psychological aptitude-testing apparatus; ozone therapy, oxygen therapy; aerosol therapy, artificial respiration or other therapeutic respiration apparatus; parts and accessories thereof * * *. Mechano-therapy appliances; massage apparatus; psychological aptitude-testing apparatus; parts and accessories thereof * * *. Mechano-therapy appliances and massage apparatus; parts and accessories thereof.

Issue:

Are the jetted baths and whirlpool spas classified as baths, shower baths and washbasins under subheading 3922.10.00, HTSUS, or as mechano-therapy appliance and massage apparatus under subheading 9019.10.20, HTSUS'?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classifica-

tion shall be determined according to terms of the headings and any relative section or chapter notes * * *."

Subheading 3922.10.00, HTSUS, provides for baths, shower baths and washbasins. Note 2(q), Chapter 39, HTSUS, states that Chapter 39, HTSUS, does not cover:

> Articles of chapter 90 (for example, optical elements, spectacle frames, drawing instruments).

Therefore, if the jetted baths and whirlpools spas are classifiable within Chapter 90, HTSUS, they are excluded from classification within Chapter 39, HTSUS.

Subheading 9019.10.20, HTSUS, provides for mechano-therapy appliance and massage apparatus. Institutional jacuzzis have been classified under subheading 9019.10.20, HTSUS. *See,* NY 871935 dated March 25, 1992. Additionally, the classification of a domestic bath and massage apparatus, the "AQUASPA", was addressed by the Harmonized System Committee (HSC). The HSC decided that pursuant to Note 3 to Chapter 90, Harmonized Tariff Schedule (HTS), the "AQUASPA" was classifiable under subheading 9019.10, HTS, as massage apparatus, and not under subheading 3922.10, HTS, as a bath. The HSC classification opinion has been inserted into the Compendium of Classification Opinions and, there fore, is given the same weight as the Harmonized Commodity Description and Coding System Explanatory Notes (ENs). The classification opinion and the ENs, although not dispositive, provide a commentary' on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

NY 839530 classified the jetted baths and whirlpool spas under subheading 3922.10.00, HTSUS. However, we believe that "domestic-use" tub/hydromassage units similar to the articles at issue in NY 839530 are not distinguishable from institutional tub/hydromassage units. Based on NY 871935 and the HSC classification opinion, the jelled baths and whirlpool spas are properly classified under subheading 9019.10.20, HTSUS.

Note 3, Chapter 90, HTSUS, states that "[t]he provisions of note 4 to section XVI apply also to this chapter." Note 4, Section XVI, HTSUS, states that:

> Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cable or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

In this case, the jetted baths and whirlpool spas consists of various components, *i.e.*, the shell, jets, motor, pump, heater, and frame, which are designed to function together to create a whirlpool or massage bath. As the components function together to create the jetted baths and whirlpools spas, we are of the opinion that they constitute a functional unit pursuant to Note 4, Section XVI and Note 3, Chapter 90, HTSUS. Therefore, the jetted baths and whirlpool spas are classified in the heading appropriate to their function as a whirlpool or massage bath under subheading 9019.10.20, HTSUS, as mechano-therapy appliance and massage apparatus.

Holding:

The jetted baths and whirlpool spas are classified under subheading 9019.10.20, HTSUS, as mechano-therapy appliance and massage apparatus. The corresponding duty rate for articles of this subheading is 4.2 percent *ad valorem.*

NY 839530 is hereby revoked. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF REED FENCING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of fencing made of bamboo and reeds. Notice of the proposed revocation was published December 28, 1994, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse, for consumption on or after April 17, 1995.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Office of Regulations and Rulings, Textile Classification Branch (202–482–7050).

SUPPLEMENTARY INFORMATION:

BACKGROUND

After careful review of New York Ruling Letter (NYRL) 800598, dated August 9, 1994, it was decided that the ruling was in error and should be revoked. On December 28, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, No. 52, proposing to revoke NYRL 800598, which classified fencing made of bamboo and reeds in subheading 4602.10.5000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). That subheading provides for other articles made directly to shape from plaiting materials or made up from articles of heading 4601, of other vegetable materials. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs is revoking NYRL 800598 to reflect proper classification of the fencing in subheading 4421.90.7020, HTSUSA, which provides for assembled fence sections of wood. Note 6 to Chapter 44, HTSUSA, provides that the term "wood" applies to bamboo and other materials of a woody nature. Headquarters Ruling Letter 956983 revoking NYRL 800598 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 30, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 30, 1995.

CLA-2 CO:R:C:T 956983 BC
Category: Classification
Tariff No. 4421.90.7020

PAT GOLEMBIESKI
HOME DEPOT U.S.A., INC.
2727 Paces Ferry Rd., N.W.
Atlanta, GA 30339

Re: Fencing made of bamboo and reeds; not plaiting materials; Note 1, Chapter 46; Note 6, Chapter 44; materials of a woody nature; NYRL 800598.

DEAR MS. GOLEMBIESKI:

The Customs Service has had occasion to reexamine the classification determination made in New York Ruling Letter (NYRL) 800598, issued to you on August 9, 1994. We herein revoke that ruling for the reasons explained below. Notice of the proposed revocation of NYRL 800598 was published December 28, 1994, in the CUSTOMS BULLETIN, Vol. 28, No. 52, pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625). No comments were submitted.

Facts:

The merchandise at issue is fencing made of bamboo and reeds. The bulk of the fencing consists of whole reeds sewn together side by side with thread. At each end is a peeled and polished strip of bamboo. As imported, the fencing measures 6 feet by 15 feet. The reeds, of a material other than bamboo, are natural plants that grow in lakes and rivers. Because they are whole reeds, with diameters from 2 mm to 4 mm, they are not readily flexible.

Issue:

What is the proper classification for the fencing at issue?

Law And Analysis:

Our National Import Specialist experienced in the classification of the kind of articles at issue has advised us that the reeds making up the fencing at issue are not suitable for plaiting. Note 1 of Chapter 46, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), provides that plaiting materials are "materials in a state or form suitable for plaiting, interlacing or similar processes * * *." The reeds at issue, as whole reeds, lack the flexibility for plaiting. Consequently, the fencing made primarily of these materials cannot be classified in Chapter 46, HTSUSA.

Note 6 to Chapter 44, HTSUSA, provides the following: "For the purposes of this chapter * * *, any reference to 'wood' applies also to bamboo and other materials of a woody

nature." Thus, the fencing at issue qualifies as wood for classification purposes, as it consists of bamboo and reeds that qualify as "other materials of a woody nature".

Since no heading of chapter 44 provides explicitly for fencing, the fencing at issue is classifiable under heading 4421, HTSUSA, which provides for other articles of wood. Specifically, it is classifiable as assembled fence sections in subheading 4421.90.7020, HTSUSA.

Holding:

The fencing at issue, made of bamboo and whole reeds, is classifiable as assembled fence sections in sub heading 4421.90.7020, HTSUSA. The applicable duty rate is free. Accordingly, NYRL 800598 is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF PROTECTIVE GEAR FOR USE IN THE SPORT OF IN-LINE SKATING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs is modifying certain rulings pertaining to the tariff classification of certain food supplements. Notice of the proposed modification was published December 21, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 51.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse, for consumption on or after April 17, 1995.

FOR FURTHER INFORMATION CONTACT: Arnold L. Sarasky, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 21, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 51, proposing to modify District Director (DD) Ruling Letter 898364, issued June 20, 1994, by the District Director of Customs, Portland, ME, which held that protective wrist guards

used in the sport of in-line skating were classified under subheading 6216.00.4600, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). No comments were received concerning the matter.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs is modifying DD 898364. Accordingly, Customs is issuing a ruling letter to reflect proper classification of the merchandise in subheading 9506.70.2090, HTSUSA, which provides for "Roller skates and parts and accessories thereof, Other." The ruling modifying DD 898364 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(e)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 31, 1995.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 31, 1995.

CLA–2 CO:R:C:F 957120 ALS
Category: Classification
Tariff No. 9506.70.2090

MR. GORDON C. ANDERSON
MEYER CUSTOMS BROKERS
8100 Mitchell RD., Suite 200
Eden Prairie, MN 55344

Re: Modification of District Ruling Letter (DD) 898364, dated June 20, 1994, regarding protective wrist guards designed for use in the sport of in-line skating.

DEAR MR. ANDERSON:

In DD 898364 you were advised that protective wrist guards for use in the sport of in-line skating were classifiable in subheading 6216.00.4600, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We noted that the ruling was premised on the classification of such items as gloves. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of DD 898364 was published December 21, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 51.

Facts:

The articles under consideration, which are referred to as a wrist guards, are fabricated from a combination of knit and mesh man-made fibers which provide the base of the

guards, synthetic leather stitched on the stress areas, velcro® fastener straps, and molded plastic inserts on the backs and fronts. The articles do not have sheathes and fourchettes which cover the fingers. They have thumb holes and only cover the wrists and upper part of the hands.

Issue:

What is the classification of the subject articles imported for use in the sport of in-line skating?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's) taken in order. GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

DD 898364 held that the subject wrist guards were classifiable in subheading 6216.00.4600, HTSUSA, the provision for "Gloves, Mittens, and Mitts: Other: of man-made fibers: other gloves, mitten and mitts, all the foregoing specially designed for use in sports, including ski and snowmobile gloves, mittens and mitts." That ruling held that other protective gear used in the sport of in-line skating, i.e., elbow and knee pads, were classifiable in subheading 9506.70.2090, HTSUSA. That subheading provides for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports * * *: Ice skates and roller skates, including skating boots with skates attached; parts and accessories thereof: other."

We note that the wrist guards covered by that ruling did not have fingers or thumbs. They had a thumb hole and the remainder thereof merely covered the upper part of the hands. We do not believe that these items, without sheaths and fourchettes to cover the fingers and thumbs, are gloves. These articles are not, therefore, excluded from classification in Chapter 95, HTSUSA, by legal note I to that Chapter. Accordingly, these wrist guards, which perform a protective function similar in nature to the other protective gear covered by DD 898364, should be classified in the same subheading as those items.

Holding:

Wrist guards, for use as protective gear in the sport of in-line skating, which have neither fingers nor thumbs but only cover the wrists and palms of the hands, are classifiable in subheading 9506.70.2090, HTSUSA, whether separately imported or imported in a set with other protective gear for use in in-line skating. Merchandise so classifiable is subject to a free general rate of duty.

DD 898364 is affirmed as to the elbow and knee pads covered thereby. It is modified as to the wrist guards covered therein. In accordance with section 625, this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF SHQE SPIKES (STUDDED PULLOVERS)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of studded pullovers, also known as shoe spikes. These articles are designed to be worn over shoes or boots to provided slip protection on ice or snow. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before March 17, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Donald F. Cahill, Metals and Machinery Classification Branch, (202–482–7030).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of studded pullovers, also known as shoe spikes. These articles are designed to be worn over shoes or boots to provide slip protection on ice or snow. Studded pull overs and shoe spikes consist of a rubber harness into which metal spikes have been imbedded. The rubber harness pulls on and off any type of shoe or boot by means of heel tabs. The rubber harness does not cover the sole or upper of the footwear or provide protection against water, oil, grease or chemicals or cold or inclement weather. It merely holds the spikes in place under the wearers foot.

In DD 898471 issued on June 7, 1994, by the District Director of Customs, New Orleans, Louisiana, studded pullovers for shoes and boots were classified under subheading 6406.99.90, Harmonized Tariff Schedule of the United States (HTSUS), which provides for parts of footwear, other, of other materials, other. DD 898471 is set forth in Attachment A to this document.

In Headquarters Ruling Letter (HRL) 087541 dated October 11, 1990, shoe spikes with rubber straps were also classified under subheading 6404.99.90, HTSUS. HRL 087541 is set forth in Attachment B to this document. Customs Headquarters is of the opinion that DD 898471 and HRL 087541 erroneously classified the studded pullovers and the shoe spikes under subheading 6406.99.90, HTSUS. Specifically, we have concluded that shoe spikes and studded pullovers are not parts of footwear for tariff classification purposes because they are not an integral, constituent, or component part, without which the shoe or boot to which joined, could not function as a shoe or boot. They are, in fact, accessories for use with footwear. Inasmuch as the studded pullovers and shoe spikes are composite articles consisting of different materials or made up of different components, their classification is dependent upon a determination as to which material or component gives them their essential character. The studded pullovers and shoe spikes are *prima facie* classifiable under subheading 4016.99.05, HTSUS, as other articles of vulcanized rubber other than hard rubber, other, household articles not elsewhere specified or included; or under subheading 4015.90.50, HTSUS, as articles of apparel and clothing accessories, for all purposes, of vulcanized rubber other than hard rubber, other; or under subheading 7326.90.85, HTSUS, as other articles of iron or steel, other, other, other.

Customs is unable to determine which material or component imparts the essential character to the merchandise, noting that although rubber exceeds metal in terms of bulk, weight, and probably value, the metal spikes perform a crucial function in providing traction for shoes on ice or snow. The rubber harness merely holds the metal spikes in place. Consequently, following GRI 3(c), HTSUS, classification under subheading 7326.90.85, HTSUS, is appropriate as " * * * the heading which occurs last in numerical order among those which equally merit consideration." Customs intends to revoke DD 898471 and HRL 087541 to reflect the proper classification of shoe spikes and studded pullovers under subheading 7326.90.85, HTSUS, as other articles of iron or steel, other, other, other.

Before taking this action, consideration will be given to any written comments timely received. Pro posed HRL 956963 which revokes DD 898471 is set forth in Attachment C.

Proposed HRL 957548 which revokes HRL 087541 is set forth in Attachment D.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 27, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New Orleans, LA, June 7, 1994.

CLA–2–64–NO:CO:FNIS D09
Category: Classification
Tariff No. 6406.99.90

CHRISTA REINLE
MANAGER ADMINISTRATION
CONTITECH GROUP
15 Essex Road
Paramus, NY 07652

Re: The tariff classification of spiky and spiky plus overshoes from Germany.

DEAR MS. REINLE:

In your letter dated May 25, 1994, you requested a tariff classification ruling.

You submitted two samples labeled Sample A and Sample B. Sample A is called Spiky and Sample B is called Spiky Plus. Each consists of a pair of studded pullovers for shoes and boots. The pullovers are designed to provide slip protection on ice and snow. The metal spikes are set in tough flanges, which are pressed into a contoured, sandal-like rubber harness that pulls on and off over any type of shoe or boot by means of a heel tab. Sample A, Spiky, has the four metal spikes in the toe area positioned under the ball of the wearers foot; whereas Sample B, Spiky Plus, has four metal spikes in the toe area as well as two in the heel area. Although the pullovers are made of rubber, we believe the essential character is imparted by the metal shoe spikes.

The studded pullovers do not have an upper with an applied sole; therefore, they cannot be classified as footwear. However, they can only be worn when attached to a shoe or boot.

Thus, the applicable subheading for the above samples will be 6406.99.90, Harmonized Tariff Schedule of the United States (HTS), which provides for parts of footwear; removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof. Other: Of other materials: Other. The rate of duty is 18 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Please note the ruling (indicator) number shown on the top center of the first page of this letter. Includ ing this number with the ABI transmission of the Customs entry may entitle you to paperless processing of type 01 entries for the merchandise covered by this ruling. The filer should make any software modifications necessary to implement this streamlined processing. If we can be of any assistance in this endeavor, please contact Customs ACS Specialist Walter Vaughn at (504) 589–2082.

JOANNE C. CORNELISON,
District Director.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 11, 1990.

CLA–2:CO:R:C:G 087541 SR
Category: Classification
Tariff No. 6406.99.90

MS. LEAH M. POUDRIER
WEISSENFELS, INC.
44 Amaral Street
East Providence, RI 02915

Re: Shoe spikes.

DEAR MS. POUDRIER:

This is in reference to your letter of June 5, 1990, requesting the tariff classification of shoe spikes under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Samples produced in Italy were submitted.

Facts:

The merchandise at issue is a pair of removable shoe spikes that are designed to provide traction to shoes on ice or snow. The metal studs are 3/16 of an inch thick and are riveted to a fluted rubber pad that serves as a partial outer sole. The rubber pad is somewhat triangular in shape with a base that is 3 inches in width and 2½ inches long. The small end of the pad, which faces the wearer's shoe, splits into two rubber strips that wrap around the back of the shoe to hold the shoe spikes in place. The strips are approximately ½ inch in width and 8 inches in length. They interlock by means of a rubber rivet which allows the spikes to be adjusted in length to wrap around the wearer's shoe. The top of the pad has a 2¼ inch wide slot which is designed to be stretched over the toe of the wearer's shoe. The spikes are designed to be positioned under the ball of the wearers foot.

Issue:

Whether the shoe spikes are classifiable as parts of footwear or as metal shoe protectors.

Law and Analysis:

Heading 6406, HTSUSA, provides for parts of footwear; removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof. The Explanatory Notes provide the official interpretation of the tariff at the international level. The Explanatory Notes to heading 6406, HTSUSA, provide the following:

This heading covers:

(A) The various component parts of footwear; these parts may be of any materials except asbestos.

Parts of footwear may vary in shape according to the types or styles of footwear for which they are intended. They include:

(1) parts of uppers (e.g., vamps, toecaps, quarters, legs, linings and clog straps), including pieces of leather for making footwear cut to the approximate shape of uppers.

(2) Stiffeners. These may be inserted between the quarters and lining, or between the toecap and lining, to give firmness and solidity at these parts of the footwear.

(3) Inner, middle and outer soles, including half soles or patins; also in-soles for gluing on the surface of the inner soles.

(4) Arch supports or shanks and shank pieces (generally of wood, leather, fibreboard or plastics) for incorporation in the sole to form the curved arch of the footwear.

(5) Various types of heels made of wood, rubber, etc., including glue-on, nail-on and screw-on types; parts of heels (e.g., top pieces)

(6) Studs, spikes, etc., for sports footwear.

(7) Assemblies of parts (e.g., uppers, whether or not affixed to an inner sole) not yet constituting nor having the essential character of footwear as described in headings 6401 to 6405.

(B) The following fittings (of any material except asbestos) which may be worn inside the footwear: removable in-soles, hose protectors (of rubber, rubberized fabric, etc.) and removable interior heel cushions.

The shoe spikes do not have an upper with an applied sole; therefore, they cannot be classified as foot wear. However, they can only be worn when attached to a shoe or boot. They are spikes, however, they are not necessarily used on sports footwear.

The shoe spikes are similar to removable outer soles. Although most of the items that are listed under this provision are parts that will be permanently affixed to a shoe, some articles, such as removable insoles and hose protectors, are also classifiable under this provision. The shoe spikes are outer soles that are similar to footwear parts that are listed in this provision.

Subheading 6406.20.00, HTSUSA, provides for parts of footwear, outer soles and heels of rubber or plastics. The shoe spikes are composed of rubber and metal. The metal spikes impart the essential character of the shoe spikes. Therefore they are not classifiable under subheading 6406.20.00, HTSUSA.

Holding:

The shoe spikes at issue are classifiable under subheading 6406.99.90, HTSUSA, which provides for parts of footwear; removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof, other, of other materials, other. The rate of duty is 18 percent *ad valorem*.

ARTHUR P. SCHIFFLIN,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:M 956963 DFC
Category: Classification
Tariff No. 7326.90.85

PETER W. KLESTADT, ESQ.
ERIK D. SMITHWEISS, ESQ.
GRUNFELD, DESIDERIO, LEBOWITZ AND SILVERMAN
245 Park Avenue
New York, NY 10167–0002

Re: Footwear; parts of footwear; pullovers, studded; shoe spikes with straps; composite goods; essential character; *U.S. v. Willoughby Camera Stores; Gallagher & Ascher Company v. U.S.*; HRL's 084088, 087541, 955987; DD 898471 revoked.

DEAR MESSRS. KLESTADT AND SMITHWEISS:

In a letter dated August 25, 1994, on behalf of ContiTech Group, you asked that District Ruling (DD) 898471 issued to them on June 7, 1994, by the District Director of Customs, at New Orleans, Louisiana, be revoked. That ruling concerned the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of studded pullovers for shoes and boots. Samples were submitted for examination.

Facts:

Samples of two types of studded pullovers, identified as "Spiky" and "Spiky Plus," were submitted for examination. They are designed to provide slip protection on ice and snow. Metal spikes are set in tough flanges, which are pressed into a contoured, sandal-like rubber harness that pulls on and off over any type of shoe or boot by means of a heel tab. The rubber harness merely holds the metal spikes in place. The harness does not cover the sole or upper or provide protection against water, oil, grease or chemicals or cold or inclement weather. "Spiky," has four metal spikes in the toe area positioned under the ball of the wearers foot. "Spiky Plus," has four metal spikes in the toe area as well as two in the heel area. You indicate that the weight of the rubber is on average 84.5% of the total weight of the article. Further, that the value of the rubber is on average 82.8% of the total value of the article.

In DD 898471, the District Director ruled that studded pullovers represented by the samples are classifiable under subheading 6406.99.90, HTSUS, which provides for parts of footwear, other, of other materials, other. The current applicable rate of duty for this provision is 14.4% *ad valorem*.

You claim that the studded pullovers are classifiable under one of the following subheadings:

> Subheading 6402.99.15, [now 6402.99.18] HTSUS, which provides for other footwear with outer soles and uppers of rubber or plastics, other footwear, other, having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics, (except footwear having a foxing or a foxing-like band applied or molded at the sole and overlapping the upper and except footwear designed to be worn over, or in lieu of, other foot wear as a protection against water, oil, grease or chemicals or cold or inclement weather), other. The applicable rate of duty for this provision is 6% *ad valorem*.
>
> Subheading 6406.20.00, HTSUS, which provides for outer soles and heels, of rubber or plastics. The applicable rate of duty for this provision is 4.8% *ad valorem*.
>
> Subheading 4016.99.05, HTSUS, which provides for other articles of vulcanized rubber other than hard rubber, other, household articles not elsewhere specified or included. The applicable rate of duty for this provision is 3.4% *ad valorem*.
>
> Subheading 4015.90.00, HTSUS, which provides for articles of apparel and clothing accessories (including gloves), for all purposes, of vulcanized rubber other than hard rubber, other. The applicable rate of duty for this provision is 4.8% *ad, valorem*.

Issue:

Are the studded pullovers considered parts of footwear for tariff purposes?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes, and, provided such headings or notes do not otherwise require, according to [the remaining GRI's]."

The Harmonized Commodity Description and Coding System Explanatory Notes to the HTSUS (EN), although not dispositive, should be looked to for the proper interpretation of the HTSUS. See T.D. 89–80, 54 FR 35127, 35128 (August 23, 1989).

The General EN's to Chapter 64, HTSUS, provide in pertinent part, as follows:

> With certain **exceptions** [not here applicable] this Chapter covers, under headings 64.01 to 64.05, various types of footwear (including overshoes) irrespective of their shape and size, the particular use for which they are designed, their method of manufacture or the materials of which they are made.
>
> For the purposes of this Chapter, the term 'footwear' **does not,** however, **include** disposable foot or shoe coverings of flimsy material (paper, sheeting of plastics, etc.) without applied soles. These products are classified according to their constituent material.
>
> (A) Footwear may range from sandals with uppers consisting simply of adjustable laces or ribbons to thigh-boots (the uppers of which cover the leg and thigh, and which may have straps, etc., for fastening the uppers to the waist for better support). The Chapter includes:
>
> * * * * * * *
>
> (7) Footwear obtained in a single piece, particularly by moulding rubber or plastics by carving from a solid piece of wood.
>
> * * * * * * *
>
> (9) Overshoes worn over other footwear; in some cases, they are heel-less.
>
> * * * * * * *
>
> (C) * * *. In the case of footwear made in a single piece (e.g.,clogs) without applied soles, no separate outer sole is required; such footwear is classified with reference to the constituent material of its lower surface.
>
> (D) For the purposes of the classification of footwear in this Chapter, the constituent material of the uppers must also be taken into account. The upper is the part of the shoe or boot above the sole. However, in certain footwear with plastic moulded soles or in shoes of the American Indian moccasin type, a single piece of

> material is used to form the sole and either the whole or part of the upper, thus making it difficult to identify the demarcation between the outer sole and the upper. In such cases, the upper shall be considered to be that portion of the shoe which covers the sides and top of the foot. The size of the uppers varies very much between different types of footwear, from those covering the foot and the whole leg, including the thigh (for example, fishermen's boots), to those which consist simply of straps or thongs (for example, sandals).

You state that the above cited EN's support your claim that the studded pullovers are footwear for the purposes of classification under headings 6401 through 6405, HTSUS, for the following reasons:

1. The cited EN's indicate that headings 6401 through 6405, HTSUS, cover articles made of a single piece of rubber which are worn over other shoes. Both "Spiky" pullovers satisfy this description and thus fall within the meaning of "footwear."
2. Classification under headings 6401 through 6405, HTSUS, does not require that the footwear have an applied sole with the exception of certain textile footwear. See Note 1(a) to Chapter 64, HTSUS. The EN's, provide in relevant part, that "in the case of footwear made in a single piece (e.g., clogs without applied soles, no separate outer sole is required; such footwear is classified with reference to the constituent material of its lower surface. For purposes of classification, the "outer sole" of the "Spiky" is its lower surface.
3. With respect to the upper, the EN's make no distinction between elastic straps on footwear made in a single piece, and straps that are attached to a separate bottom or sole component. The "Spiky" pullovers contain rubber straps which cover the side and top of the foot near the toe, and cover the side and upper ankle at the heel. These straps satisfy the description of an upper.
4. In T.D. 93–88, published in the CUSTOMS BULLETIN on November 17, 1993, Customs defined the term "outer sole" as "that part of the footwear (other than a separate heel) in contact with the ground when in use. If it has no separate 'outer sole,' e.g., it has a one-piece clog bottom, the material of the 'outer sole' is the material of the shoes' lower surface." The term "upper" is defined in T.D. 93–88 as "the part of the shoe above the separate sole or that portion of the shoe which covers the sides and top of the foot if there is no separate sole. An 'upper' can cover the whole leg, thigh, hips, end chest (e.g., fishermen's chest waders) or can consist simply of straps, laces or thongs (e.g., Roman sandals)." Thus, based on the foregoing definitions, the studded pullovers are "footwear" for tariff purposes.
5. Customs has previously classified similar merchandise as complete footwear in headings 6401 through 6405, HTSUS. For example, in HRL 084088 dated June 13, 1989, Customs classified a "super sole foot gripper" under subheading 6404.19.35, HTSUS. This item was described as follows:

> This is a footwear item that is worn strapped to the bottom of a boot or shoe in order to provide better traction on soft surfaces. The foot gripper has an upper that consists of two one-inch wide textile straps with Velcro-type closures. It has a rubber outsole with ¼ inch high, molded-in cylinder shaped nubs that have protruding metal screw heads/studs which have been screwed in. A rubber insole with a non-skid, textured face has been stitched onto the rubber outsole.

Customs concluded that the "super sole footgripper" cannot be classified as a part of footwear because it is a complete shoe. In addition, it was noted that the foot grippers are worn over other footwear and following General EN A(9) to Chapter 64, HTSUS, *supra*, are overshoes and, therefore must be classified as footwear.

CUSTOMS POSITION

We agree that classification under headings 6401 through 6405, HTSUS, does not require that the footwear have an applied sole with the exception of certain textile footwear. See Note 1(a) to Chapter 64, HTSUS.

The studded pullovers in issue are clearly "less than" footwear because most of the sole and almost all of the shoe or boot will still be seen and in use when this item is worn and even the little foot covering that it supplies is simply the result of the maker's not being able to find a way to keep the removable spikes securely attached and maintained in position while using thinner straps. The straps' only reason for being is obviously to assist the spikes. It appears to be your position that everything worn over a shoe or boot is an "overshoe." We disagree with this position. Items like removable riding spurs, whose thin straps, securing the spur, do cover some of the wearer's shoe, but are clearly not "overshoes."

You maintain that HRL 084088 dated June 13, 1989, holding that similar merchandise *viz.*, a "super sole foot gripper" is classifiable as footwear under subheading 6404.19.35, HTSUS, controls the classification of the "Spiky" pullovers. We disagree. The "super sole foot gripper" is considered to be complete footwear under that ruling, because it had an outsole and an upper whereas the instant studded pullovers are "less than footwear," *e.g.*, shoe spikes with straps. There is neither an outsole nor an upper.

STUDDED PULLOVERS ARE NOT PARTS OF FOOTWEAR

Heading 6406, HTSUS, provides, as follows:

> Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof.

Additional U.S. Rule of Interpretation 1(c), HTSUS, provides as follows:

1. In the absence of special language or context which otherwise requires—

> (c) a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for 'parts' or 'parts and accessories' shall not prevail over a specific provision for such part or accessory[.]"

In the case of *United States v. Willoughby Camera Stores*, Inc., CCPA 322, 324, T.D. 46851 (1933), the court stated that "[i]t is a well-established rule that a 'part' of an article is something necessary to the completion of that article. It is an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such.

This so-called "rule of essentiality" is not controlling in all cases. It has been held that a device may be a part of an article even though its use is optional and the article will function without it, where the device is dedicated for use upon the article, and, once installed, the article will not operate without it. See *e.g.*, *Gallagher & Ascher Company v. United States*, 52 CCPA 11, C.A.D. 849 (1964)

The "Spiky" pullovers are complete and independent articles of commerce. Although worn over shoes, they are not integral, constituent, or component parts, without which the underlying shoes could not function as footwear. The "Spiky" pullovers are optional articles for use with footwear. Therefore, they are not parts of footwear for tariff purposes.

In Headquarters Ruling Letter (HRL) 955987, dated June 30, 1994, Customs stated that "[t]he term 'accessory is not defined either in the text of the HTSUS or in the Harmonized Commodity Description and Coding System Explanatory Notes. However, an accessory, while identifiable as being intended solely or principally for use with a specific article, is generally not necessary to enable a good with which it is used to fulfill its intended function. Accessories are of secondary importance, not essential in and of themselves. However, they must somehow contribute to the effectiveness of the principal article, they must facilitate its use or handling, widen its range of uses, or improve its operation."

In view of the foregoing, it is our position that the subject studded pullovers are "accessories" because:

1. they are intended to be used solely with footwear;
2. they are not necessary to enable the footwear with which they are used to fulfill its intended function; and
3. they are not essential in and of themselves, but do contribute to the effectiveness of the footwear in that they improve its performance [traction] on ice.

STUDDED PULLOVERS ARE NOT CLASSIFIABLE AS OUTER SOLES OF RUBBER OR PLASTICS

We agree that "Spiky" pullovers are not provided for in heading 6406, HTSUS, as either removable insoles, heel cushions and similar articles or as gaiters, leggings and similar articles, and parts thereof.

However, you claim that studded pullovers, if not footwear, are properly classifiable under subheading 6406.20.00, HTSUS, which provides for outer soles and heels, of rubber or plastics. The basis for this claim is found in HRL 087541, dated October 11, 1991, wherein Customs held that certain shoe spikes were classifiable as parts of footwear under subheading 6406.99.90, HTSUS. In reaching this conclusion Customs erroneously stated that "[t]he shoe spikes are outer soles that are similar to footwear parts that are listed in this provision. The article which was the subject of HRL 087541 looked, due to its design, more like a half sole [plus the very unusual spikes and straps] than the one in issue. How-

ever, there is no question that neither are known to the trade and public as "outer soles." The fact that other items in heading 6406, HTSUS which are not parts, are removable is irrelevant, despite HRL 087541 to the fact that permanent attachment is a very strong element in both the trade and common meaning of "outer soles." When the fact that it is also much "more than" the ordinsry "outer sole, " in having spikes and about as much strapping over and around he foot as under it, and that it is much "less than" one, in that large parts of the outer sole of the shoe it is used with will be in contact with the ground in use, "outer sole" is clearly an inappropriate name.

STUDDED PULLOVERS ARE CLASSIFIABLE UNDER HEADING 7326, HTSUS

Inasmuch as the studded pullovers are composite goods their classification is governed by GRI 3(b), HTSUS, which reads, as follows:

> 3. When, by application of rule 2(b) or for any other reason, goods are *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The studded pullovers are *prima facie* classifiable under subheading 4016.99.05, HTSUS, as other articles of vulcanized rubber other than hard rubber, other, household articles not elsewhere specified or included; or under subheading 4015.90.00, HTSUS, as articles of apparel and clothing accessories, of vulcanized rubber other than hard rubber, other; or under subheading 7326.90.85, HTSUS, as other articles of iron or steel, other, other, other.

Composite goods are classifiable as if they consisted of the material or component which gives them their essential character. EN VIII to GRI 3(b), at page 4, reads as follows:

> (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The rubber portion of the pullovers exceeds the metal spikes in terms of bulk, weight and probably value. However, the metal spikes perform a crucial function in providing traction for shoes on ice and snow. Thus, we are unable to determine whether the metal spikes or the rubber portion of the pullovers imparts the essential character thereto. Consequently, following GRI 3(c), classification under subheading 7326.90.85, HTSUS, is appropriate as "* * * the heading which occurs last in numerical order among those which equally merit consideration."

Holding:

The "Spiky" pullovers are dutiable at the rate of 5.1% *ad valorem* under subheading 7326.90.85, HTSUS.

DD 898471 is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE.
Washington, DC

CLA-2: CO:R:C:M 957548
Category: Classification
Tariff No. 7326.90.85

MS. LEAH M. POUDRIER
WEISSENFELS, INC.
44 Amaral Street
East Providence, RI 02915

Re: Footwear; parts of footwear; shoe spikes; essential character; composite goods; HRL 955987; *U.S. v. Willoughby Camera Stores; Gallagher & Ascher v. U.S;* HRL 87541 revoked.

DEAR MS. POUDRIER:

This is in reference to Headquarters Ruling Letter (HRL) 87541 issued to you on October 11, 1990, concerning the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of certain shoe spikes produced in Italy. We have reviewed that ruling issued in response to your letter of June 5, 1990, and find that it is in error.

Facts:

The merchandise involved is a pair of removable shoe spikes that are designed to provide traction to shoes on ice or snow. The metal studs are 3/16inch thick and are riveted to a fluted rubber pad that serves as a partial outer sole. The rubber pad is somewhat triangular in shape with a base that is 3 inches wide and 2½ inches long. The small end of the pad, which faces the wearer's shoe, splits into two rubber strips that wrap around the back of the shoe to hold the shoe spikes in place. The strips are approximately ½ inch wide and 8 inches long. They interlock by means of a rubber rivet which allows the spikes to be adjusted in length to wrap around the wearer's shoe. The top of the pad has a 2¼ inch wide slot which is designed to be stretched over the toe of the wearer's shoe. The spikes are designed to be positioned under the ball of the wearer's foot.

In Headquarters Ruling Letter (HRL) 087541 Customs held that the subject merchandise is classifiable under subheading 6406.99.90, HTSUS, which provides for parts of footwear, other, of other materials, other.

Issue:

Are the shoe spikes considered parts of footwear for Tariff purposes?

Law and Analysis:

Classification of goods under the HTSUS Is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section of chapter notes, and, provided such headings or notes do not otherwise require, according to [the remaining GRI's]."

In HRL 087541, we stated that the shoe spikes do not have an upper with an applied sole. Therefore, they cannot be classified as footwear. This is inaccurate because classification under headings 6401 through 6405, HTSUS, does not require that footwear have an applied sole with the exception of certain textile footwear. See Note 1(a) to Chapter 64, HTSUS.

SHOE SPIKES ARE NOT PARTS OF FOOTWEAR

Heading 6406, HTSUS, provides as follows:

> Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof.

Additional U.S. Rule of Interpretation 1(c), HTSUS, provides as follows:

1. In the absence of special language or context which otherwise requires—

> (c) a provision for parts of an article covers products solely or principally used as a part of such articles but does not prevail over a specific provision for such part or accessory[.]"

In the case of *United States v. Willoughby Camera Stores, Inc.*, CCPA 322, 324, T.D. 46851 (1933), the court stated that "[i]t is a well-established rule that a 'part' of an article Is something necessary to the completion of that article. It is an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article."

This so-called "rule of essentiality" Is not controlling in all cases. It has been held that a device may be a part of an article even though its use is optional and the article will function without it, where the device is dedicated for use upon the article, and, once installed, the article will not operate without it. See *e.g., Gallagher & Ascher Company v. United States*, 52 CCPA 11, C.A.D. 849 (1964)

The shoe spikes are complete and independent articles of commerce. Although worn over shoes, they are not integral, constituent, or component parts, without which the underlying shoes could not function as footwear. The shoe spikes are optional articles for use with footwear. Therefore, they are not parts of footwear for tariff purposes.

In HRL 955987 dated June 30, 1994, Customs stated that "[t]he term 'accessory' is not defined either in the text of the HTSUS or in the Harmonized Commodity Description and Coding System Explanatory Notes. However, an accessory, while identifiable as being intended solely or principally for use with a specific article, is generally not necessary to enable a good with which it is used to fulfill its intended function. Accessories are of secondary importance, not essential in and of themselves. However, they must somehow contribute to the effectiveness of the principal article, they must facilitate its use or handling, widen its range of uses, or improve its operation."

In view of the foregoing, it is our position that the subject shoe spikes are "accessories" because:

1. they are intended to be used solely with footwear;
2. they are not necessary to enable the footwear with which they are used to fulfill its intended function; and
3. they are not essential in and of themselves, but do contribute to the effectiveness of the footwear in that they improve its performance [traction] on ice.

SHOE SPIKES ARE CLASSIFIABLE UNDER HEADING 7326, HTSUS.

Inasmuch as shoe spikes made of metal and rubber are composite goods, their classification is governed by GRI 3(b), HTSUS, which reads, as follows:

> 3. When, by application of rule 2(b) or for any other reason, goods are *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The shoe spikes are *prima facie* classifiable under subheading 4016.99.05, HTSUS, as other articles of vulcanized rubber other than hard rubber, other, household articles not elsewhere specified or included; or under subheading 4015.90.00, HTSUS, as articles apparel and clothing accessories of vulcanized rubber other than hard rubber; other, or under subheading 7326.90.85, HTSUS, as other articles of iron or steel, other, other, other.

Composite goods are classifiable as if they consisted of the material or component which gives them their essential character. EN VIII to GRI 3(b), as page 4, reads as follows:

> (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The rubber portion of the shoe spikes exceeds the metal spikes in terms of bulk, weight, and probably value. However, the metal spikes perform a crucial function in providing traction for shoes on ice and snow. Thus, we are unable to determine whether the metal spikes or the rubber portion of the shoe spikes imparts the essential character thereto. Consequently, following GRI 3(c), HTSUS, classification under subheading 7326.90.85, HTSUS, is appropriate as "* * * the heading which occurs last in numerical order among those which equally merit consideration."

Holding:

The shoe spikes are dutiable at the rate of 5.1% *ad valorem* under subheading 7326.90.85, HTSUS.

HRL 087541 is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF TRACTORS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification of certain tractors. These are upgraded versions of tractors which Customs previously determined to be suitable for agricultural use. Customs invites comments on the correctness of the proposed modification.

DATE: Comments must be received on or before March 17, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Submitted comments may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th. Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT; James A. Seal, Metals and Machinery Classification Branch (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification of certain tractors. Customs invites comments on the correctness of the proposed modification.

HQ 951434, dated June 23, 1992, held, in part, that certain Massey-Ferguson tractor models were classifiable free of duty in subheading 8701.90.10, Harmonized Tariff Schedule of the United States (HTSUS), as tractors suitable for agricultural use. The tractors in question are the MF models 30E, 40E, 50E, 50EX, 50H and 50HX. This ruling was based on the assertion that the models in issue were upgraded versions of tractors previously held to be suitable for agricultural use, and also on end-use surveys purporting to establish that the tractors were intended for use in recognized agricultural pursuits. *HQ* 951434 is set forth as "Attachment A" to this document.

It is now Customs position that evidence of suitability for agricultural use may be insufficient with respect to the MF models 50H and 50HX. These models are believed to be marketed only in backhoe/loader configurations with power take-off and three point hitch—traditional agricultural tractor features—being optional. In addition, the referenced end user survey does not support suitability for agricultural use with respect to these models.

Customs intends to modify *HQ* 951434 to reflect the proper classification of the subject tractor models under subheading 8701.90.50, HTSUS, as other tractors. Before taking this action, we will give consideration to any written comments timely received. Proposed *HQ* 957033 modifying *HQ* 951434 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 26, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 23, 1992.

CLA–2 CO:R:C:M 951434 AJS
Category: Classification
Tariff No. 8701.90.10 and 8701.90.50

MR. L. J. STOUT
GENERAL SALES MANAGER
MASSEY-FERGUSON INDUSTRIAL MACHINERY INC.
1700 Belle Meade Court
Lawrenceville, GA 30243

Re: Tractors; suitable for agricultural use; *U.S. v. F.W. Myers & Co.*; HQ 951506; HQ 054346; TC 434.1 c; H. Conf. Rep. No. 576; CIE N–71/77.

DEAR MR. STOUT:

This is in reply to your letter of March 26, 1992, requesting the tariff classification of various Massey-Ferguson (MF) tractor models under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The models of tractors at issue are the MF 60HX, 40E, 30E and 50HX, 50H, 50EX, 50E (50 series). These tractors are being used to handle manure, move feed and grain, load fertilizer, carry fruit and vegetables, install field drainage systems and irrigation systems, handle silage, clean feed lots, accomplish field and tillage work, mow and maintain pastures and grasslands.

The MF 30, 40 and 50 series models are upgraded versions of tractors which Customs previously determined are "suitable for agricultural use." The improvements made to these models involved commercial enhancements, intended to promote salability and to stay current with technology, such as in the area of engine and working tool performance. However, the basic tractor base and overall capabilities, as well as the scope of use, have remained the same.

The MF 30E, 40E, 50E and 50EX are power take-off (PTO) tractors. The PTOs provide the power for the various attachments which are used with tractors. The MF 30E has a PTO of 30.8 kW, the 40E a PTO of 38 kW, and the 50E and 50EX possess a PTO of 44.9 kW. The MF 50H, 50HX and 60HX are not PTO tractors, but can accommodate an optional PTO.

It is our understanding that the additional letter(s) added to the basic model number of the tractor indicate, for example, the country of origin, four wheel drive capabilities or that substantial updated specifications are involved. See Master Tractor Classification Index, CIE N–71/77, Supplement #2 (April 8, 1983).

Issue:

Whether the subject tractors are properly classifiable within subheading 8701.90.10, HTSUS, which provides for tractors suitable for agricultural use; or classifiable within subheading 8701.90.50, HTSUS, which provides for "other" tractors.

Law and Analysis:

Subheading 8701.90.10, HTSUS, provides for tractors suitable for agricultural use. The phrase "suitable for agricultural use" has been interpreted by the courts as requiring that a tractor be actually, practically, and commercially fit for such use. Suitability does not require that the tractor be chiefly used in agricultural pursuits, but there must be evidence of more than a casual, incidental, exceptional or possible use in this area. There must be evidence of substantial actual use in a recognized agricultural pursuit. *U.S. v. F.W. Myers & Co., Inc.*, C.A.D 1097, 476 F.2d 1377 (1973); See also HQ 951506 (5/29/92)

It is claimed that the subject models are upgraded versions of tractors which we have previously ruled are "suitable for agricultural use." In HQ 054346 (1/10/78), we ruled that models of the MF 50 series satisfy this requirement. In TC 434.1 c (10/9/69), we ruled that models of the MF 30 and 40 series also satisfy this requirement. However, we have not ruled on the suitability for agricultural use of the MF 60HX tractor.

Congress has indicated that earlier tariff decisions must not be disregarded in applying the HTSUS. The conference report to the 1988 Omnibus Trade Bill states that "on a case-

by-case basis prior decisions should be considered instructive in interpreting the HTS[US] , particularly where the nomenclature Previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTS[US]." H. Conf. Rep. No. 576, 100th Cong., 2d Sess., p. 550, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS p. 1582. In this case, the nomenclature previously interpreted by the courts and Customs is identical and the text of the HTSUS does not require a different result. Accordingly, we find these previous tariff decisions instructive for interpreting subheading 8701.90.10, HTSUS, and its applicability to the MF 30, 40 and 50 series tractors.

A product end-use survey Covering the period 1989–91 was submitted which indicates that approximately one third of the 350 subject tractors sold were intended for use in the various agricultural pursuits outlined previously. Based on this survey and previous tariff decisions, we find that the subject MF 30, 40 and 50 series models are "suitable for agricultural use." Therefore, these tractors satisfy the terms of sub heading 8701.90.10, HTSUS, and are properly Classifiable therein.

The submitted survey, however, indicates that only 4 of the MF 60HX sales were intended for agricultural use. In our view, four sales does not establish substantial actual use in a recognized agricultural pursuit. Evidence of additional sales must be provided in order to establish that the MF 60HX models are suitable for agricultural use. Until this time, the model 60HX is Classifiable within subheading 8701.90.50, HTSUS, which provides for "other" tractors which are not suitable for agricultural use.

Holding:

The tractors models MF 30E, 40E, 50HX, 50H, 50EX and 50E are classifiable within subheading 8701.90.10, HTSUS, which provides for tractors suitable for agricultural use, duty-free.

The tractor model MF 60HX is classifiable within subheading 8701.90.50, HTSUS, which provides for "other" tractors, dutiable at the General Column 1 rate of 2.2 percent *ad valorem*.

ARTHUR P. SCHIFFLIN,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2:CO:R:C:M 957033 JAS
Category: Classification
Tariff No. 8701.90.50

MR. L. J. STOUT
GENERAL SALES MANAGER
MASSEY-FERGUSON INDUSTRIAL MACHINERY INC.
1700 Belle Meade Court
Lawrenceville, GA 30243

Re: Tractors other than track-laying; suitability for agricultural use, *U.S. v. F.W. Myers & Co., Inc.*, subheading 8701.90.10; other tractors; *HQ* 951434 modified.

DEAR MR. STOUT:

In *HQ* 951434, issued to you on June 23, 1992, we held that certain Massey-Ferguson tractor models were classifiable free of duty in subheading 8701.90.10, Harmonized Tariff Schedule of the United States (HTSUS), as tractors suitable for agricultural use.

In a later ruling, *HQ* 955502, issued to you on March 31, 1994, we held that the MF vehicle models 750, 860 and 965 were excavating machines classifiable In subheading 8429.59.10, HTSUS. The models 750 and 860 were said to directly replace the MF models 50H and 50HX, which were among the models addressed In *HQ* 951434. We advised you that *HQ* 951434 would be modified accordingly. This modification does not affect the status

of the MF 50H and 50HX as "tractors." The issue is the sufficiency of evidence of their suitability for agricultural use.

Facts:

HQ 951434, dated June 23, 1992, addressed the tariff status of a certain line of Massey-Ferguson wheeled tractor. We held that the MF 30E, 40E, 50E, 50EX, 50H, and 50HX were classifiable in subheading 3701.90.10, Harmonized Tariff Schedule of the United States (HTSUS), as tractors suitable for agricultural use. We held he MF 60HX to be classifiable in subheading 8701.90.50, HTSUS, a provision for other tractors, because of a lack of evidence of suitability for agricultural use.

The provisions under consideration are as follows:

8701	Tractors (other than tractors of heading (8709):	
8701.90	Other:	
8701.90.10	Suitable for agricultural use * * *	Free
8701.90.50	Other * * *	1.8 percent

Issue:

Whether the MF models 50H and 50HX are tractors suitable for agricultural use.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 6 states in part that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, by appropriate substitution of terms, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable. For the purposes of Rule 6, the relative section, chapter and subchapter notes also apply, unless the context requires otherwise.

To be "suitable for agricultural use" it must be established that a tractor is actually, practically and commercially fit for such use. Evidence of sole use or even principal use is not required. However, there must be evidence of substantial actual use in a recognized agricultural pursuit. *U.S. v. F.W. Myers & Co., Inc.*, C.D. 4256, C.A.D. 1097, 476 F. 2d 1377 (1973).

In previous rulings on earlier generations of Massey-Ferguson tractors, the models either had power take-off end hydraulic hitch or were imported with attachments and implements dedicated to agricultural applications. In addition, sales statistics and end user statements supported suitability for agricultural use. However, in *HQ* 951434 it was stated, among other things, that the MF 50H, MF 50HX and MF 60HX are not PTO tractors, but can accommodate an optional PTO. As you know, power take-off is a feature that permits a tractor to utilize a variety of attachments and implements, many of which relate directly to agricultural pursuits. In addition, a more thorough review of the end user survey submitted in connection with the ruling request that resulted in *HQ* 951434 indicates that of the 181 reported tractor sales during the period in question only 5 MF 50Hs and 3 MF 5OHXs were sold to agricultural end users. For these reasons, we conclude that the evidence of record does not support a finding that the MF 50H and the MF 50HX are suitable for agricultural use.

Holding:

Under the authority of GRI 1, the Massey-Ferguson tractor models 50H and 50HX are provided for in heading 8701. They are classifiable in subheading 8701.90.50, HTSUS, as other tractors. The MF 60HX remains classifiable in subheading 8701.90.50, HTSUS, as indicated in *HQ* 951434.

Effect on Other Rulings:

HQ 951434, dated June 23, 1992, is modified as indicated.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 134

ADVANCE NOTICE OF PROPOSED CUSTOMS REGULATIONS AMENDMENTS CONCERNING THE COUNTRY OF ORIGIN MARKING REQUIREMENTS FOR FROZEN PRODUCE PACKAGES

RIN 1515–AB61

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Advance notice of proposed rulemaking; solicitation of comments.

SUMMARY: This document provides advance notice of a proposal to amend the Customs Regulations to: (1) prescribe rules regarding a conspicuous place for the marking of country of origin on packages of frozen produce; and (2) establish rules concerning the appropriate type size and style to be employed in marking frozen produce packages. The purpose of this document is to help determine whether a rulemaking is needed to ensure a uniform standard for conspicuous and legible country of origin marking for packages of frozen produce, and, if needed, the contents of that rulemaking.

DATES: Comments must be received on or before March 20, 1995.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 1301 Constitution Ave., N.W., Washington, DC 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Wende Schuster, Special Classification and Marking Branch, Office of Regulations and Rulings (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Failure to mark an article in accordance with the requirements of 19 U.S.C. 1304 shall result in the levy of a duty of ten percent *ad valorem*. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

Customs Ruling and Court Action:

On May 9, 1988, Norcal Crosetti Foods, Inc. and other California packers of domestically-grown produce requested a ruling from Customs concerning what constituted conspicuous country of origin marking for packages of frozen produce, *i.e.*, whether the marking should be located on the front or some other panel of the package and in what type size and style it should appear. Specifically, Customs was asked to determine whether packaged frozen produce was considered conspicuously marked if the marking did not appear on the front panel of the package in prominent lettering. Sample packages which were not marked on their front panels were submitted with the ruling request. On November 21, 1988, Customs issued a ruling (Headquarters Ruling Letter (HRL) 731830), stating that the country of origin markings on all of the samples submitted were in compliance with the country of origin marking requirements, as the packages were marked by names and words which appeared on the back panel of the packaging in close proximity to nutritional and other information.

The packers appealed Customs determination in HRL 731830 to the Court of International Trade (CIT). *Norcal/Crosetti Foods, Inc. v. U.S. Customs Service*, 15 CIT 60, 758 F.Supp. 729 (1991) *(Norcal I)*. In *Norcal I*, the court ruled that frozen produce is not marked in a conspicuous place unless it is marked on the front panel of the package. The court remanded the matter to Customs with directions to issue a new ruling. Pursuant to the court's order in *Norcal I*, Customs issued Treasury Decision (T.D.) 91–48 (56 FR 24115, May 28, 1991), which required the country of origin marking for frozen produce to be placed on the front panel of the package.

Arguing that the CIT did not have jurisdiction to decide the case, the government appealed the CIT's decision to the Court of Appeals for the Federal Circuit. *Norcal/Crosetti Foods, Inc. v. U.S.*, 963 F.2d 356 (Fed.Cir. 1992) *(Norcal II)*. In *Norcal II*, the court ruled on procedural grounds to reverse the judgment of the CIT and remand the case with instructions to dismiss the complaint for lack of jurisdiction. The appellate court reasoned that since the packers' had not exhausted their

administrative remedies, their claims were not properly before the CIT. The court further indicated that a proper course would have been for the packers to initiate a proceeding before Customs under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516).

The 516 Petition and Agency Action (1993):

A 516 petition (the *Norcal* petition) was initiated by letters dated January 13 and January 29, 1993, and filed with Customs under 19 U.S.C. 1516 and Part 175, Customs Regulations (19 CFR Part 175). The petitioners were Norcal Crosetti Foods, Inc. and Patterson Frozen Foods, Inc., California packers of produce grown domestically. The International Brotherhood of Teamsters, on behalf of its Local 912, submitted a letter dated February 24, 1993, supporting the Norcal and Patterson petition. The *Norcal* petition asked Customs to reconsider its position in HRL 731830, and to adopt the findings of the CIT in *Norcal I*.

The petitioners contended that imported frozen produce is not marked in a conspicuous place in accordance with the requirements of 19 U.S.C. 1304. The petitioners argued that under a correct application of 19 U.S.C. 1304, the indication of country of origin must appear on the front panel of a package to be considered as marked in a conspicuous place. These domestic producers argued further that Customs standards for the size and prominence of such country of origin markings were not in conformity with 19 U.S.C. 1304.

Customs published a notice in the Federal Register on September 9, 1993 (58 FR 47413), advising the public of the petitioners' contentions and soliciting public comments on the issues raised in the petition. Also in this notice, Customs effectively suspended the effective date of T.D. 91–48 by reinstating HRL 731830. Seventy-one comments were submitted in response to the petitions.

In T.D. 94–5 (58 FR 68743, December 29, 1993), Customs issued a final interpretive ruling based on the comments which were received in response to the September 9 Federal Register notice. T.D. 94–5 stated that back panel marking was insufficient and front panel country of origin marking was prescribed in a specified type size and style designed to match the net weight or net quantity of contents marking of the product under the Food Labeling Regulations (21 CFR 101.105). In T.D. 94–5, Customs modified T.D. 91–48 by requiring that conspicuous marking within the meaning of T.D. 91–48, shall be limited to marking which complies with the additional specifications for type size and style set forth in T.D. 94–5. The effective date initially established for the decision in T.D. 94–5 was May 8, 1994, in order to allow importers time to modify their packaging. On March 29, 1994, however, Customs issued two Federal Register documents: one (59 FR 14458) suspending the compliance date of May 8, 1994, for parties adversely affected by the country of origin marking requirements specified in T.D. 94–5, and the other (59 FR 14579) giving notice of its intention to adopt a new compliance date of January 1, 1995, and soliciting comments on both the

proposed compliance date and on the specifications regarding type size and style.

In response to T.D. 94–5, however, an action was filed with the Court of International Trade on behalf of American Frozen Food Institute, Inc. and National Food Processors Association, which challenged Customs decision. In *American Frozen Food Institute, Inc., et al. v. The United States,* Slip Op. 94–97 (June 9, 1994), the CIT ruled that because Customs had chosen to promulgate front panel marking in combination with other requirements needing APA [Administrative Procedure Act, 5 U.S.C. 553] rulemaking procedures, the entirety of T.D. 94–5 could not stand. The court stated that it expected Customs to formulate a rational rule based on comments received in connection with this matter before publishing any proposed rule.

The court further concluded that, because the full rulemaking process had not yet been followed, it would not rule on whether T.D. 94–5 was acceptable substantively. Since the court declared T.D. 94–5, in its entirety, null and void, there is no decision on the January 1993 petition filed by Norcal Crosetti Foods, Inc. and Patterson Frozen Foods, Inc. The decision on the 516 petition will be held in abeyance. Publication of this document is without prejudice to an ultimate decision on the 516 petition.

ISSUES FOR CONSIDERATION IN DETERMINING WHETHER CUSTOMS SHOULD ISSUE A NOTICE OF PROPOSED RULEMAKING WITH REGARD TO SPECIFIC COUNTRY OF ORIGIN MARKING OF FROZEN PRODUCE

The Customs Service is considering issuing a notice of proposed rulemaking to amend the Customs Regulations to prescribe rules regarding a conspicuous location for the country of origin marking on packages of frozen produce and to require that such marking meet certain type size and style specifications. Although relevant comments were received in response to the Federal Register notices pertaining to T.D. 94–5, there are several other issues on which we would like to receive additional public comments before deciding whether to propose rulemaking on this matter. In addition to general comments, interested parties are invited to comment on the following specific issues:

(1) Is there a need for Customs to initiate a proposed rulemaking regarding country of origin marking of frozen produce?

(2) Whether there are current abuses in the country of origin marking of imported packages of frozen produce. If so, whether such abuses require that Customs prescribe country of origin marking requirements by rules applicable to all packages of frozen produce, or whether the abuses should be handled on a case-by-case basis.

(3) For purposes of the marking statute and regulations, are there sound reasons of public policy for treating frozen produce differently from produce packaged in other ways *(e.g.,* canned goods)?

(4) Whether the front panel of frozen produce is the only "conspicuous place" on the package for country of origin marking.

(5) Whether a specified location on another panel *(e.g.,* the back panel) where the country of origin marking is demarcated by, for example, a box, a header, bold print, margins, a contrasting background, or other graphic devices, would constitute a "conspicuous place" for purposes of the marking statute.

(6) Whether Customs should prescribe, by regulation, certain type size and style specifications for the country of origin marking of frozen produce. If so, whether the regulations should specify one type size for all packages of frozen produce, or different type sizes depending upon the size of the package. If one type size is prescribed for all packages of frozen produce, what type size should be recommended and why?

(7) Whether for purposes of country of origin marking, the term "produce" should be defined to include both fruits and vegetables.

(8) Where frozen produce packaging contains produce sourced from multiple countries, should this have any bearing on the placement of the country of origin marking?

(9) Whether the particular conditions of the frozen food section in a store impact on the likelihood that a consumer will notice label information regarding country of origin without this information being given special prominence. If so, whether there is any empirical evidence of such consumer behavior.

(9) Whether consumer behaviors and attitudes toward country of origin marking of frozen produce can be documented with studies or surveys. If so, how much time would be needed for a study or survey to be conducted and for the data to be analyzed?

(10) If Customs goes forward with a notice of proposed rulemaking, what should be a sufficient period of time for public comment?

(11) If Customs issues a notice of proposed rulemaking, should a public hearing be held in connection with such proposed rulemaking?

(12) If Customs proposes and adopts new country of origin marking regulations, what would be an appropriate time frame between the publication of the final rule and the effective date of such regulations?

(13) What other issues should be addressed in the proposed rulemaking in order to afford a full opportunity for public comment?

Comments:

In order to assist Customs in determining whether to proceed with a notice of proposed rulemaking to prescribe rules regarding the country of origin marking for packages of frozen produce, and the appropriate type size and style specifications for such marking, this notice invites written comments on the issues raised in this document as well as any other issues in connection with this matter.

Consideration will be given to any comments that are timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and

section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1099 14th Street, N.W., Suite 4000, Washington, DC.

WILLIAM F. RILEY,
Acting Commissioner of Customs.

Approved: January 27, 1995.

RONALD K. NOBLE,
Under Secretary of the Treasury.

[Published in the Federal Register, February 2, 1995 (60 FR 6464)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–7)

TARGET SPORTSWEAR, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–12–00833

[Plaintiff's motion for partial summary judgment denied; defendant's cross-motion for summary judgment granted; action dismissed.]

(Dated January 23, 1995)

Wasserman, Schneider & Babb (Jack Gumpert Wasserman, Bernard Babb and *David M. Steiner,* Esqs.); *Howard P. Roy,* General Counsel, Target Sportswear, Inc., of counsel, for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Robert J. Krask,* Esq.); *David J. Weiler,* Office of the Chief Counsel for Int'l Commerce; *Laura R. Siegel,* General Attorney, Office of the Assistant Chief Counsel, Int'l Trade Litigation, U.S. Customs Service, of counsel, for defendant.

Rosalie Simmonds Ballentine, Attorney General of the Virgin Islands *(Joseph M Erwin,* Assistant Attorney General (Tax), Virgin Islands Dep't of Justice and *Winston & Strawn (Peter N. Hiebert,* Esq.) of counsel, *Amicus Curiae* in support of plaintiff.

OPINION

INTRODUCTION

NEWMAN, *Senior Judge:* A rejection by the United States Customs Service ("Customs") of plaintiff's entry of men's suits exported from the U.S. Virgin Islands due to plaintiff's failure to submit an export visa from the Dominican Republic, where the suits were assembled, showing compliance with quota restrictions on Dominican Republic textile products, as required by a 1993 interim regulation, precipitated this litigation.

Section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. § 1854 ("§ 204"), authorizes the President to negotiate agreements with foreign governments to limit the quantity of imports into the United States of textiles and textile products of such foreign countries and to issue regulations to carry out such agreements. Plaintiff, Target Sportswear, Inc. ("Target"), a United States importer of men's suits from the U.S. Virgin Islands, challenges the validity of 19 C.F.R. § 12.130(c)(2), effective May 14, 1993, T.D. 93–27, an interim regulation promulgated by the Commissioner of Customs concerning rules of country of origin

for textiles and textile products imported from insular possessions, including the U.S. Virgin Islands ("interim regulation").[1]

At issue is the scope of the President's congressionally-delegated authority in conformance with § 204 to issue country of origin regulations to carry out textile trade agreements negotiated pursuant to the statute.[2] Specifically in dispute is the President's authority to make a narrow exception to the "substantial transformation" test prescribed in § 12.130(b) under which regulation the country or territory in which merchandise last underwent a "sub stantial transformation" is regarded as the country of origin.

Under the exception created by the challenged interim regulation, textile products substantially trans formed in an insular possession, shipped to a foreign country for assembly or other processing, returned to the insular possession, and then exported to the United States are treated by Customs as a product of the foreign country rather than as a product of the insular possession for purposes of implementing quotas established by the foreign country's textile trade agreement with the United States.

Essentially, then, the primary issue is whether the delegation of authority to the President to administer the United States' textile trade program under § 204 encompasses the authority to issue or to amend rules of origin for textiles and textile products substantially transformed in a United States insular possession and also processed in at least one foreign country or territory.

The resolution of this issue is obviously of critical economic importance to exporters and United States importers of textile and textile products from the United States insular possessions, assemblers and processors of textile products in foreign countries under quota restrictions imposed by textile trade agree ments, United States textile manufacturers that compete in the marketplace with textile exports from United States insular possessions, the governments of the insular possessions having economic interests in attracting textile manufacturing and fostering an export trade to the United States, and of course, Customs which is charged with responsibility for monitoring the entry of goods covered by quotas under the textile trade program. The somewhat parallel legal and financial interests in the issues raised in this case by Target and the government of the U.S. Virgin Islands are evident

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[1] On April 14, 1993, the interim regulation was published in the Federal Register, *Country of Origin of Textile Products From U.S. Insular Possessions*, 58 Fed. Reg. 19347, 19349 (April 14, 1993) and became effective 30 days later, on May 14, 1993. Interim Regulation 19 C.F.R. § 12.130(c)(2), published as T.D. 93–27, added part (c)(2) to the original country of origin regulation § 12.130 finalized in T.D. 85–38, 50 Fed. Reg. 8710 (March 5, 1985).

[2] Fundamentally, under the U.S. Constitution the authority to regulate foreign commerce and trade with other nations lies exclusively with the Congress. U.S. Const., Art. I, § 8, cl. 3; Congress may delegate such authority to the Executive. *California Bankers Association v. Schultz*, 416 U.S. 21, 59 (1974); *Chicago and Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933).

Although in this opinion the court refers to the interim regulation as issued by the President, in actuality the Customs Service promulgated the interim regulation at the request of the Committee for the Implementation of Textile Agreements ("CITA"), which was established by Executive Order 11651 on March 2, 1972 to supervise the implementation of textile trade agreements. Section 2(a) of that Executive Order requires the Commissioner of Customs to take such actions as CITA, through its Chairperson, recommends to carry out agreements entered into by the United States under section 204 of the Agricultural Act of 1956. The Customs Service's notice announcing its promulgation of the interim regulation states that it was issued pursuant to authority granted by the Congress to the President in § 204.

from the fact that the latter, through its Attorney General, appears in this action in conformance with CIT Rule 76 and an order of this court dated April 14, 1994 as *amicus curiae* in support of Target's challenge to the interim regulation.

Target requests the court to rule: (1) as a matter of law the interim regulation is *ultra vires* and invalid; and (2) therefore, Customs must allow the entry of plaintiff's merchandise under Entry No. 122–4521169–8, dated December 9, 1993, consisting of men's wool suits, notwithstanding the provisions of § 12.130(c)(2), *supra*.

BACKGROUND

Procedurally, this action contests the denial of plaintiff's protest to Customs pursuant to 19 U.S.C. §§ 1514 (a)(4) and 1515 against the rejection by Customs on December 10, 1993 of plaintiff's Entry No. 122–4521169–8, dated December 9, 1993, Covering twelve men's suits made of 100% worsted wool from India cut into suit components in the U.S. Virgin Islands, sewn in the Dominican Republic, shipped to the Virgin Islands for finishing and then exported to the United States. Customs denied entry to plaintiff's goods because plaintiff failed to present with the entry a textile export visa issued by the Dominican Republic, wherein the fabric was sewn, as required by the interim regulation. This interim regulation requires that importers of textile products processed in a foreign country but exported from insular possessions of the United States submit an export visa from the foreign government. Hence, under the interim regulation, the foreign country where the textiles or textile products were merely assembled and sewn prior to importation from an insular possession is regarded as the "country of origin" for quota purposes, notwithstanding that the goods exported to the United States were "substantially transformed" in the insular possession.

Jurisdiction to review denial of protests is predicated on 28 U.S.C. § 1581(a), and accordingly, this action is before the court for *de novo* review. 28 U.S.C § 2636. Currently *sub judice* are plaintiff's motion for partial summary judgment under CIT Rule 56 on count one of a two count complaint[3] and defendant's response and cross-motion for summary judgment or to dismiss this action in its entirety. The court has reviewed the Statements of Material Facts Not in Dispute filed by the parties and finds there is no genuine issue as to any material fact and the cross-motions raise only a question of law.

On the legal issue presented under count one of the complaint of whether the interim regulation is *ultra vires,* the court holds that the regulation is valid, plaintiff's suits exported from the U.S. Virgin Islands were properly denied entry by Customs because plaintiff failed to submit with its entry an export visa from the Dominican Republic where the suits were assembled, and that as a matter of law defendant is entitled to summary judgment dismissing the action. *See Sweats Fash-*

[3] Count two of the complaint alleges economic hardship incurred by Target as a result of enforcement of the interim regulation and seeks a permanent injunction against enforcement of the interim regulation by Customs based on invalidity, as alleged in Count one of the complaint.

ions, Inc. v. Pannill Knitting Co., 833 F. 2d 1560 (Fed. Cir. 1987); *Mingus Constructors, Inc. v. United States*, 812 F. 2d 1387 (Fed. Cir. 1987); *Barmag Barmer Maschinenfabrik AG v. Murata Machines*, 731 F. 2d 831 (Fed. Cir. 1984).

PERTINENT STATUTE AND REGULATIONS

Statute:

Section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. § 1854 (1988) provides:

> The President may, whenever he determines such action appropriate, negotiate with representatives of foreign governments in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any * * * textiles or textile products, and the President is authorized to issue regulations governing the entry or withdrawal from warehouse of any such * * * textiles, or textile products to carry out any such agreement. * * *

Regulations:

19 C.F.R. § 12.130(b) (1993):

> (b) *Country of origin.* For the purpose of this section and except as provided in paragraph (c), a textile or textile product, subject to section 204, Agricultural Act of 1956, as amended, imported into the customs territory of the United States, shall be a product of a particular foreign territory or country, or insular possession of the U.S., if it is wholly the growth, product, or manufacture of that foreign territory, or country, or insular possession. However, except as provided in paragraph (c), a textile or textile product, subject to section 204, which consists of materials produced or derived from, or processed in, more than one foreign territory or country, or insular possession of the U.S., shall be a product of that foreign territory, or country, or insular possession where it last underwent a substantial transformation. A textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

19 C.F.R. § 12.130(c)(2) (1993), the interim regulation at issue:

> (c) *Articles exported for processing and returned.*
>
> (2) *Applicability to U.S. insular possession products processed outside the insular possession.* Unless otherwise required by law, the rules of origin applicable to products of the U.S. shall also apply to products of insular possessions of the U.S. Accordingly, notwithstanding paragraph (b) of the section, for purpose of section 204, * * * products of insular possessions of the U.S., if imported into the U.S. after having been advanced in value, improved in condition, or assembled, outside the insular possessions shall not be treated as products of those insular possessions.

PARTIES' CONTENTIONS

Count one of the two count complaint requests declaratory relief to the effect that the interim regulation is outside the President's authority under § 204, and therefore, as a matter of law is *ultra vires*, and seeks to overturn Customs' exclusion from entry of plaintiff's merchandise exported from the U.S. Virgin Islands because plaintiff failed to submit an export visa from the Dominican Republic. Plaintiff posits, based on a number of inextricably linked grounds addressed below, that § 204 authorizes the President to negotiate and conclude textile trade agreements imposing quotas only with regard to *foreign governments*, whereas the interim regulation imposes quotas on products of insular possessions (which are not foreign countries), thus exceeding the scope of the authority delegated in § 204.

Defendant, on the other hand, emphatically denies that the interim regulation imposes quotas on textile products of the U.S. Virgin Islands and maintains that the interim regulation is within the President's broad authority under § 204 to issue regulations to administer the Government's textile trade program and to "carry out" bilateral textile trade agreements between the United States and foreign countries—in this case the Dominican Republic. Defendant further argues that Target's complaint, in part, sets forth claims that are not justiciable and fail to state a claim upon which relief can be granted.

THE FACTS

The relevant facts are straightforward and undisputed.

The U.S. Virgin Islands, purchased from Denmark in 1916,[4] is an insular possession of the United States under the Act of March 3, 1917, ch. 171, 39 Stat. 1132 *et seq.*, codified at 48 U.S.C. §§ 1392 *et seq*. In this case, Target's affiliated exporter in St. Croix, U.S. Virgin Islands cut unmarked fabric, suit lining and interlining materials into garment pieces for men's wool suits, such garment pieces were joined to form components of the garments where appropriate, and then all components and suit parts were shipped to the Dominican Republic for assembly and sewing. Unfinished assembled suits sewn in the Dominican Republic were then returned to the U.S. Virgin Islands, completed and exported to the United States.

On January 20, 1989, the United States and the Dominican Republic entered into a bilateral textile trade agreement limiting the quantities of certain textile products which could be exported to the United States. The Dominican Republic agreed to control exports by the issuance of export visas. The bilateral trade agreement between the United States and the Dominican Republic, among other things, establishes a quota upon the number of men's and boy's wool suits that may be imported into the United States. The availability of such visas is limited because the quantity exported is controlled by the quota for the particular category of goods in question under the trade agreement.

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[4] See Convention on Cession of Danish West Indies, Aug. 4, 1916, U.S.-Den., T.S. No. 629.

On December 9, 1993 plaintiff, the importer of record or consignee of the subject merchandise, attempted to enter for consumption its wool suits at JFK International Airport by presenting Entry No. 122–4521169–8 and accompanying documents. On December 10, 1993 Customs, in compliance with the interim regulation, refused to allow entry of plaintiff's suits on the ground that the suits were advanced in value, improved in condition, or assembled outside the insular possessions—*viz.*, in the Dominican Republic—and plaintiff had failed to present a textile visa from the Dominican Republic, as required by the interim regulation.

Finally, defendant concedes that Customs issued ruling letter CLA–2 CO:R:CV:V 554027 MBH, dated January 13, 1987, long prior to the 1993 interim regulation, which letter concludes that manufacturing operations in the Virgin Islands resulting in "substantial transformation" create products of the U.S. Virgin Islands for purposes of Headnote 3(a) of the Harmonized Tariff Schedule of the United States, and that assembly operations in the Dominican Republic do not constitute a "substantial transformation."

DISCUSSION

I

Section 204, so far as pertinent, authorizes the President to: (1) negotiate agreements with foreign governments limiting the exportation of textiles and textile products to the United States; and (2) promulgate regulations to "carry out" such agreements. Customs, at the recommendation and direction of the Committee for the Implementation of Textile Agreements ("CITA") (which by Executive Order 11651 of March 3, 1972 supervises the implementation of textile agreements), promulgated the interim regulation in dispute. As previously noted, Target vigorously insists that the interim regulation exceeds the authority granted by Congress to the President in § 204 to promulgate regulations implementing textile agreements with foreign governments because the interim regulation imposes quotas on textiles from insular possessions.

Fundamentally, of course, the President's exercise of Congressionally delegated authority in matters concerning international trade must be within the scope of the authority granted and comply with procedures prescribed by Congress (if any); conversely, regulatory action taken, ostensibly pursuant to the President's authority under the statute, but beyond the scope of the delegated authority or in noncompliance with prescribed procedures, is *ultra vires* and void. *See United States v. Schmidt Pritchard & Mangano Cycles Co.*, 47 CCPA 152, C.A.D. 750, *cert. denied*, 364 U.S. 919 (1960); *United States v. Best Foods, Inc.*, 47 CCPA 163, C.A.D. 751 (1960); *Luggage & Leather Goods Manufacturers of America, Inc. v. United States*, 7 CIT 258, 588 F. Supp. 1413 (1984).

Defendant maintains, and the court agrees, that cases relied on by plaintiff involving whether or not the President, in exercising delegated authority under a statute, complied with Congressionally-established

procedures and limitations are readily distinguishable and have no bearing on the instant case because, as noted by the Federal Circuit in *American Association of Exporters and Importers-Textile and Apparel Group v. United States*, 751 F.2d 1239, 1247 (Fed. Cir.1985) *("American Association")*, the law imposes no procedural requirements or limitations upon the President's implementation of the United States' textile program. All that the Government must do is "point to the proper authorizing provision and [show that the action taken was] rationally related to the provision[1] 5 objective." *American Association*, 7 CIT 79, 583 F. Supp. 591, 598 (1984), *aff'd*, 751 F. 2d 1219 (1985).

The court agrees with defendant that the interim regulation readily satisfies that test and is "relevant to the enforcement of an existing textile agreement," *American Association*, 751 F.2d at 1247, the United States-Dominican Republic trade agreement. *See Mast Industries. Inc. v. Regan*, 8 CIT 214, 596 F. Supp. 1567, 1575 (1984) ("Mast I"). The interim rule of origin, an exercise of the broad delegation of authority to the President under § 204 to promulgate regulations to carry out trade agreements, is clearly relevant to the implementation, enforcement and effectiveness of existing textile agreements in achieving their goal of limiting textile imports into the United States. *Mast I*, 596 F. Supp. at 1575 (limitation of textile imports is the common purpose of § 204, The Multifiber Arrangement and bilateral textile trade agreements).

Consistent with the treatment of United States textile products sent abroad for further processing and then returned to the United States, *see* 19 C.F.R. § 12.130(c)(1), Customs deemed Target's merchandise to be a textile product of the Dominican Republic in conformance with the provisions of the interim regulation. As aptly pointed out by defendant in support of its argument that the interim regulation is authorized by § 204 because it meets the objective of the statute and Congressional policy of implementing existing trade agreements by precluding circumvention of quantitative restrictions on textile imports: "If section 204 only authorized the issuance of regulations governing imports of textile products which have been last substantially transformed in a foreign country and exported from that country, as Target argues, Pl. Br. 27, soon every insular possession would be used as a platform for importing textiles into the United States in order to evade quantitative restrictions contained in bilateral trade agreements. While that might foster the economic development of the insular possessions, it would obviously blunt 'the common purpose of Section 204, the MFA and the bilaterals * * * to limit imports of textiles' into the United States so as to protect the domestic textile industry. *Mast 1*, 596 F. Supp. at 1575." Deft. Br. at 20.

There is no dispute that plaintiff's goods underwent substantial transformation in the U.S. Virgin Islands prior to the assembly and sewing operations in the Dominican Republic. Plaintiff correctly states that where statutory language in a tariff provision requires a determination of country of origin, it has long been a basic tenet of Customs Law, as

judicially and administratively articulated (and now codified in 19 C.F.R. § 12.130(b)), that an imported article's country of origin is the country or place where it last under went a "substantial transformation," that is, the last location where a new and different article emerged, *see Bellcrest v. United States*, 741 F. 2d 1368 (Fed. Cir. 1984); *Anheuser-Busch Brew. Assoc. v. United States*, 207 U.S. 556, 562 (1908); *Superior Wire v. United States*, 11 CIT 608, 613–14, 669 F. Supp. 472, 477–78 (1987), *aff'd*, 867 F. 2d 1409, 1413–14 (1989) and *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 472–74, 664 F. Supp. 535, 537–38 (1987); *Rules of Origin Applicable to Imported Merchandise*, 59 Fed. Reg. 141, 142 (Jan. 3, 1994); 19 Cust. Bull. 58, 64–65, T.D. 85–38 (proposing rules to add more certainty and uniformity to the substantial transformation test). Indeed, prior to the interim regulation, plaintiff requested and received two Ruling Letters from customs Headquarters. These rulings concluded that manufacturing operations in the Virgin Islands resulting in a "substantial transformation" create "products of the U.S. Virgin Islands" for purposes of Headnote 3(a) of the Harmonized Tariff Schedule of the United States. Customs also ruled that the partial assembly operations in the Dominican Republic would not constitute "substantial transformation." Customs Service Headquarters Rulings CLA–2 CO:R:CV:V 554027 MBH (January 13, 1987); CLA–2 CO:R:CV:V 554025 MBH (Dec. 16, 1986). Thus, there can be no dispute that prior to the interim regulation, substantial transformation was judicially and administratively a well-embedded test for country of origin determinations.

Unfortunately for plaintiff, the plethora of judicial authority and administrative pronouncements concerning determination of country of origin prior to the interim regulation do not address the precise issue here of the President's authority under § 204 to make an exception in the substantial transformation test for goods processed in one or more foreign countries. In the final analysis, there is no evidence whatever of Congressional intent in § 204 that there may be no exception from the substantial transformation test.

Moreover, the rationale of *Cardinal Glove v. United States*, 4 CIT 41, 43–44 (1982), involving a determination of country of origin where there is "exportation of merchandise from a country producing a product to an intermediate country for the purpose of processing, manipulating, or assembling that product," (4 CIT at 43–44), heavily relied on by plaintiff, was expressly rejected as unsound legal authority by the Federal Circuit in applying the country of origin rules promulgated by Customs. *Mast Industries Inc. v. United States,* 11 CIT 30, 652 F. Supp. 1531. aff'd, 822 F.2d 1069, 1073–74 (1987) *(Mast II).* Indeed, *Mast II eschews reliance* generally upon case law developed before the original rules of origin. *Mast II*, 855 F.2d at 1073–74 ("caselaw is considered the source of the evil the regulation was meant to correct, and thus is something to avoid, not to seek out for guidance").

From the premise that substantial transformation was the judicial and administrative test of choice for country of origin determinations at the time the interim regulation was issued, plaintiff draws the dubious deduction that under § 204 Congress intended the substantial transformation test be an absolutely inviolable criterion for all country or origin determinations regardless of the statutory purpose of the determination, unless *Congress itself* sanctioned an exception, *i.e.*, section 805(d)(1) of the Steel Import Stabilization Act, 19 U.S.C. § 2253; Headnote 2, Schedule 8, Part 1, Tariff Schedules of the United States. Implicit in plaintiff's reasoning is that legislative power to make an exception to the substantial trans formation test for country of origin purposes is not delegable to the President under § 204 to implement the textile trade agreement program. The court cannot agree.

Defendant's position that the delegation of authority under § 204 is sufficiently broad to empower the President to make the exception in the substantial transformation test set forth in the interim regulation is supported by controlling judicial authority addressing the broad reach of the President's authority under § 204 to implement textile trade agreements.

Thus, in *American Association, supra*, which involved a challenge to the exercise of the President's authority under § 204 in connection with certain import restrictions on Chinese textiles, the Federal Circuit observed regarding the President's authority:

> On the contrary, the beginning of Section 204 says that the President "may, whenever he determines such action appropriate"—*and that preamble covers, not only negotiation with foreign representatives, but also the issuance of regulations "to carry out" the negotiated agreements*. That is a broad grant of authority to the President in the international field in which the *congressional delegations are normally given a broad construction.*

Id. at 1247 (citations omitted, emphasis added).

Importantly, the court also stated:

> [Section 204] * * * imposes no restrictions on the President's administration of the textile trade program. There are no procedural requirements nor limitations. We find no basis, either within section 204 itself, the overall statutory scheme, or of legislative history, to add more to the statute than meets the eye. *All that is needed is that the President's action be relevant to the enforcement of some existing textile agreement.*

Id. (emphasis added). That appears to be the precise situation regarding the interim regulation and the United States-Dominican Trade Agreement.

Other decisions construing § 204 as a broad grant of authority to the President to issue regulations implementing textile trade agreements are: *Yuri Fashions, Inc. v. United States*, 10 CIT 189, 632 F. Supp. 41, *aff'd*, 804 F. 2d 1246 (1986) (adopting CIT's opinion), *cert. denied*, 481 U.S. 1004 (1987) (upholding rules of origin, § 12.130(b), pertaining to textile products imported into the United States from insular posses-

sions as opposed to foreign countries); *Mast I*, 596 F. Supp. at 1575 (original country of origin regulations held to be a valid exercise of the President's authority under section 204; Congress' delegation to the President in the foreign affairs arena should be broadly construed, rather than "'hemmed in or cabined, cribbed, confined by anxious judicial blinders'").

Defendant additionally stresses that the 1993 interim regulation's country of origin rule was merely an extension of long-standing Executive policy and action in implementing textile trade agreements by country of origin rules *to avoid circumvention of quota restrictions under textile trade agreements*.

Thus, on May 9, 1984 the President directed the Secretary of the Treasury, in consultation with CITA, to issue regulations designed "to prevent circumvention of multilateral and bilateral agreements to which the United States is a party and to facilitate efficient and equitable administration of the United States Textile Import Program. Exec. Order 12,275, 40 Fed. Reg. 16,645 (1984). Among other things, the President directed that, as necessary, such regulations should clarify or revise textile country of origin rules. *Id.*

Soon thereafter, in accordance with policy guidance from CITA, the Secretary of the Treasury issued interim rules of origin for textiles and apparel, 49 Fed. Reg. 31,248 (Aug. 3, 1984), which were finalized in 1985, 50 Fed. Reg. 8,710 (March 5, 1985), and codified at 19 C.F.R. § 12.130. For textiles and textile products produced or manufactured in more than one foreign country, foreign territory, or insular possession of the United States, these rules of origin provided that the textile or textile product at issue should be deemed to be "a product of that foreign territory or country, or insular possession where it last underwent a substantial transformation." 19 C.F.R. 12.130(b). The rules define a "substantial transformation" to mean "transformed by means of substantial manufacturing or processing operations into a new and different article of commerce." *Id.*

However, by the 1993 interim regulation, Customs in a limited departure from its long-time reliance upon the substantial transformation test, following policy guidance provided by CITA, revised in part, the rules of origin for textiles and textile products produced in an insular possession and then subjected to additional processing in a foreign country or territory. 58 Fed. Reg. 19,437 (1993). Instead of continuing to treat a textile product as a product of the foreign country or territory or insular possession where it was last substantially transformed, 19 C.F.R. § 12.130(b), the interim regulation carves out an exception to the sub stantial transformation test previously established in the original rules of origin.

According to defendant, supported by an affidavit of July 8, 1994 executed by Rita D. Hayes, Chairman, Committee for the Implementation of Textile Agreements (CITA):

> This change in the rules of origin arose, in part, as a result of a ruling request directed to the Customs Service in August 1991. That request prompted concern that the then current rules of origin appeared to allow "all insular possessions [to] be used as cutting tables for foreign fabric with assembly taking place in a foreign country while still allowing the goods to be considered a product of [an] insular possession and subject to quota." * * *
>
> The change also resulted from the concern that the then current rules of origin placed United States' textile producers and workers at a competitive disadvantage. * * * Specifically, "if a [United States] producer cut [United States] formed fabric into pieces in New York and shipped the pieces to a foreign country for mere assembly, the finished goods would be a product of that foreign country and subject to that foreign county's quota." * * * Under the then current rules of origin, however, an insular possession producer engaging in the same activities would be able to treat the textiles as products of the United States, not subject to quota, when imported into the United States. * * * Consequently, CITA and the Customs Service changed the rules of origin to address these concerns.

Def't Mem. at 8–9 and attached exh. E.

Consistent with the treatment of United States textile products sent abroad for further processing and then returned to the United States, 19 C.F.R. § 12.130(c)(1),[5] and in compliance with the interim regulation, Customs deemed Target's merchandise sent to the Dominican Republic for assembly and sewing not to be a textile product of the U.S. Virgin Islands, notwithstanding such goods had been substantially transformed there, but rather as products of the Dominican Republic for quota purposes.

Judicial authorities cited by plaintiff involving the determination of country of origin under the substantial transformation test, *e.g.*, *Belcrest v. United States*, 741 F.2d 1368 (Fed. Cir. 1984) (determination of whether goods were a product of Hong Kong or the Peoples Republic of China for purposes of General Headnote 3(e), TSUS, based on substantial transformation test), are totally inapposite to the precise issue here of Presidential authority to make an exception from such test if deemed appropriate to "carry out" textile trade agreements. Stated otherwise, the issue here is not simply whether the statutory terms "product" or "growth, produce or manufacture" implicate the time-honored sub stantial transformation test for determining country of origin. Rather, the critical question to be resolved here is whether the scope of the President's authority to issue regulations under § 204 is sufficiently broad to make an exception in the substantial transformation test if deemed

[5] The country of origin rules adopted in 1985 provided that any textile product which is returned to the United States after having been advanced in value or improved in condition abroad may not, upon its return, be considered as a product of the United States. The current rule is at 19 C.F.R. § 12.130(c).

appropriate by the President to advance the objectives of the trade agreements program. The court unequivocally responds in the affirmative.

By operation of the interim regulation's exception to the substantial transformation test for country of origin purposes, Target's products from the Virgin Islands are treated for quota purposes, not as products of an insular possession, but rather as products of the Dominican Republic. Plaintiff's argument that the interim regulation imposes quotas on textile products of insular possessions is simply a smokescreen for plaintiff's rejected contention that the substantial transformation test is dispositive of a product's country of origin, and such argument also obfuscates the thrust of the interim regulation merely to make an exception in the substantial transformation test for country of origin determinations and *not* impose quotas on products of insular possessions.

Plaintiff also objects that the interim regulation ambivalently results in the treatment of plaintiff's suits under the Customs Laws as both "foreign and not foreign." In that vein, plaintiff urges that on the one hand Customs regards plaintiff's suits as "products of" the U.S. Virgin Islands for purposes of preferential duty treatment and marking of country of origin, but on the other hand, as "products of" the Dominican Republic for quota purposes.[6] The fallacy of the argument that in Customs Law goods can not be treated both as "foreign and not foreign," depending upon the purpose of the particular statute under consideration is demonstrated in the case of imports from insular possessions that would have been accorded a duty-free status if based solely on a substantial transformation country of origin test, but yet must be denied duty-free preference granted to United States insular possessions because the goods comprise foreign materials exceeding a prescribed percentage (*viz.*, 50 percent) of the total value of the imported goods, thus subjecting the goods to rates of duty applicable to foreign countries. *See* general note 3(a)(iv) of the Harmonized Tariff Schedules of the United States. *See also Yuri Fashions*, 632 F. Supp. at 47, which suggested that merchandise may be treated in one manner for textile rule of origin purposes (Korean) and another for duty and marking purposes (a product of the CNMI).

To buttress their mutual challenge to the interim regulation, Target and *amicus* each seeks to interject into the question of the intent of the statute, Congress' economic and trade policies of the 1980s manifested in the "special status" of the U.S. Virgin Islands by preferential duty status granted under the Harmonized Tariff Schedule of the United States, General Headnote 3(a)(iv), and the Caribbean Basin Economic Recovery Act of 1983, P.L. No. 98–67, 5 214. 97 Stat. 369, 392–93, and other indicia of Congressional concern for the economic well-being of the insu-

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[6] Rules of origin apply in a variety of contexts, a few of which include: (1) the marking of products imported into the United States to disclose the country of origin, 19 U.S.C. § 1304(a); (2) the administration of quota limits, such as those on textiles (3) the determination of the appropriate rate of duty; the granting of certain trade preferences under the GSP, 19 U.S.C. §§ 2461–2466, and the Caribbean Basin Initiative, 19 U.S.C. §§ 2701–2706; (5) free trade agreements; and (6) the Buy American Act, 41 U.S.C. § 10a–10d.

lar possessions that are claimed to militate against any Congressional intent to authorize the 1993 interim regulation.

Amicus, for instance, points out that prior to the interim regulation, the original rules of origin provided an important incentive for conducting textile manufacturing operations in the Virgin Islands. Under the original rules, if a textile product had undergone a "substantial transformation" in the U.S. Virgin Islands, the product could be sent to the Dominican Republic or other foreign country for further processing with out losing its character as a product of an insular possession for quota purposes. According to *amicus*, the original rule promoted substantial manufacturing operations in the U.S. Virgin Islands and allowed producers to take advantage of lower labor costs in foreign countries in the Caribbean region for assembly and sewing operations, which were in short supply in the U.S. Virgin Islands.

Such economic policy arguments are simply another format for attacking the interim regulation by rehashing the rejected arguments that because the regulation unlawfully excepts substantial transformation as the test for country of origin, such regulation treats insular possessions as foreign countries and imposes quotas on their products. Moreover, plaintiff and *amicus* have failed to point to anything that suggests that preferential duty status granted by Congress, *see* General Note 3(a)(iv) of the HTSUS, was intended to extend to anything other than duty treatment or to any other program. *Yuri Fashions*, 632 F. Supp. at 46 ("nothing in the legislative history of the General Headnote 3(a) [to the Tariff Schedules of the United States] known to the court indicates that the headnote was intended to regulate anything other than rate of duty").

Further, it is obvious that the economic concerns and programs of the 1980s dredged up by plaintiff and *amicus* as manifesting a Congressional intent against the interim regulation, were not matters before Congress when it enacted § 204. Plainly, the wisdom of the President's policy choices in issuing the interim regulation in 1993 is not a matter for judicial review in determining whether the interim regulation is *ultra vires*. *American Association*, 751 F. 2d 1248; *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795–96 (Fed. Cir. 1984) (once it is determined that the President acted within the confines of the authority delegated to him, no further role for courts exists); *United States Cane Sugar Refiners Ass'n v. Block*, 69 CCPA 172, 683 F. 2d 399, 404 (1982) ("let the President's action be authorized, and let his action be within the authorizing provisions of the law he cites, and the role of the judiciary is at an end").

II

Plaintiff maintains that the interim regulation violates the United States' obligations to the Dominican Republic under its bilateral textile trade agreement by charging products exported from the U.S. Virgin Islands against the quantitative limitations applicable to the Dominican Republic under its bilateral agreement, and Congress would not have

intended such result under § 204. Citing *United States v. Gue Lim*, 179 U.S. 459, 465 (1900), plaintiff insists that § 204 should not be construed to vest the President with the power to violate United States international obligations to foreign governments by unilaterally reducing the quotas negotiated by the parties under the bilateral trade agreement.

Defendant contends that the issue of whether or not the interim regulation impairs the international obligations of the United States to foreign countries under bilateral textile trade agreements is a nonjusticiable foreign relations issue, and in any event plaintiff has no private right of action to enforce U.S. obligations to the Dominican Republic under the parties' trade agreement.

Plaintiff concedes it has no private right of action against the Government to enforce international obligations owed to the Dominican Republic under its textile trade agreement with the United States, but correctly maintains that it may challenge the interim regulation as *ultra vires* because, *inter alia*, it conflicts with United States obligations under textile trade agreements.

III

Finally, plaintiff avers that it is entitled to the relief sought because plaintiff established its U.S. virgin Islands operations in reliance on the original country of origin regulations and letter rulings mentioned *supra*. However, it is well settled that no one has a vested right to import or in the maintenance of an existing tariff status of the goods. *See Board of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48, 57 (1933) ("[n]o * * * vested right to carry on foreign commerce with the United States"); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933) ("[n]o one has a legal right to the maintenance of an existing rate of duty"); *Arjay Assoc., Inc. v. Bush*, 891 F. 2d 894, 896 (Fed. Cir. 1989) (no untouchable right to the continued importation of any product); *North Amer. Foreign Trading Corp. v. United States*, 783 F. 2d 1031, 1032 (Fed. Cir. 1986) (no vested right to a particular classification or rate of duty or preference).

CONCLUSION

For the foregoing reasons, it is hereby ORDERED:

1. Plaintiff's motion for partial summary judgment is denied;
2. Defendant's cross-motion for summary judgment is granted;
3. The action is dismissed.

Judgment will be entered accordingly.

(Slip Op. 95–8)

SKF USA INC. AND SKF GMBH, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 92–07–00514

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record. Plaintiffs specifically contest the Department of Commerce, International Trade Administration's ("Commerce") (1) imposition of a difference in merchandising adjustment cap as a test for identifying similar merchandise; (2) disregarding plaintiffs' claim that U.S. inland insurance expense was insignificant and application of the reported insurance rate to U.S. price when the rate reported was based upon inventory value, thereby resorting to best information available; and (3) disallowance of certain billing adjustments as a direct adjustment to foreign market value.

Held: Plaintiffs' motion for judgment upon the agency record is granted in part and this case is remanded to Commerce for application of SKF's U.S. inland insurance rate to inventory value. All other issues are affirmed.

[Plaintiffs' motion is granted in part and denied in part; this case is remanded to Commerce.]

(Dated January 25, 1995)

Howrey & Simon (Herbert c. Shelley, Alice A. Kipel, Thomas J. Trendl and *Juliana M. Cofrancesco)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine);* of counsel: *Stephen J. Claeys, Dean A. Pinkert, Stacy J. Ettinger* and *Thomas H. Fine,* Attorneys, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine and *Myron A. Brilliant)* for defendant-intervenor, The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel, J. Eric Nissley and *Joseph A. Perna, V)* for defendant-intervenor, Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, SKF USA Inc. and SKF GmbH ("SKF"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of its administrative review concerning antifriction bearings (other than tapered roller bearings) ("AFB") and parts thereof from Germany. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results"),* 57 Fed. Reg. 28,360 (June 24, 1992).

Specifically, plaintiffs contest Commerce's (1) imposition of a difference in merchandising adjustment cap ("difmer") as a test for identifying similar merchandise; (2) disregarding plaintiffs' claim that U.S. inland insurance expense was insignificant and application of the reported insurance rate to U.S. price ("USP") when the rate reported was based upon inventory value, thereby resorting to best information available ("BIA"); and (3) disallowance of certain billing adjustments as a direct adjustment to foreign market value.

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on ball bearings, cylindrical roller bearings and spherical plain bearings and parts thereof. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (May 15, 1989). On June 28, 1991, July 19, 1991 and August 14, 1991, Commerce initiated administrative reviews with respect to various manufacturers and exporters from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom, including SKF GmbH, for the period May 1, 1990 through April 30, 1991. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews*, 56 Fed. Reg. 29,618 (June 28, 1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 33,251 (July 19, 1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 40,305 (August 14, 1991).

On March 31, 1992, Commerce published the preliminary results of its second administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 57 Fed. Reg. 10,859 (March 31, 1992).

On June 24, 1992, Commerce published one joint final determination for the nine administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (June 24, 1992).

On July 24, 1992, SKF filed its summons in this case, challenging the final results with respect to Germany.

DISCUSSION

This Court must uphold final results of an ITA administrative review unless the ITA determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988) . It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), aff'd, 894 F.2d 385 (Fed Cir. 1990).

1. *Difference in Merchandise Adjustment Cap:*

SKF challenges Commerce's use of a 20% difference in merchandise adjustment cap, in addition to a family model match methodology which takes eight physical criteria into account, to determine what constitutes similar merchandise. According to SKF, Commerce's institution of a difmer cap, after a hearing which followed the second review preliminary results, is a last-minute change which undermines the ability of parties to predict Commerce's actions and to alter their pricing behavior. SKF also alleges that Commerce failed to sufficiently explain its change in methodology. In sum, SKF challenges Commerce's imposition of the difmer cap in the second review where there was no difmer cap in the first review. *Brief in Support of Plaintiffs' Motion for Judgment Upon the Agency Record ("SKF's Brief")* at 14–24.

Commerce argues that the application of the difmer cap was a proper exercise of its discretion and was meant to ensure that a reasonable comparison of merchandise would be made. Commerce asserts that it has broad discretion in its selection of what constitutes "similar" merchandise and may refine its methodology in succeeding reviews. Since the two tests employed in the final determination of the second review are complimentary, the cap minimizes the effects of distortions where there is a difference in the variable costs of production and there are no circumstances in this case to warrant disregarding the cap, Commerce claims its decision was in accordance with law. Commerce states that as this is only the second review, SKF cannot claim a significant reliance on the fact that Commerce had not applied the 20% difmer cap in the original investigation or in the first administrative review. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendant's Brief")* at 5–16.

Defendant-intervenor The Torrington Company ("Torrington") agrees with SKF that the difmer cap should not be applied and additionally, contests the use of the family model match methodology. Torrington alleges that Commerce's definition of "similar merchandise" was impermissibly narrow and limiting. *Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Judgment on the Agency Record ("Torrington's Brief")* at 5–13.

Defendant-intervenor Federal-Mogul Corporation ("Federal-Mogul") opposes SKF on grounds that SKF failed to show that the use of the difmer cap had any effect on the margin calculations. *Opposition of Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment Upon the Agency Record ("Federal-Mogul's Brief")* at 10–11.

When identical merchandise is not available in the home market for comparison with the merchandise sold to the United States, Commerce must select "similar" comparison merchandise based upon the physical characteristics of the merchandise being compared. 19 U.S.C.

§ 1677(16) (1988).[1] Commerce has been granted broad discretion to devise a methodology for determining what constitutes "similar" merchandise. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

An accurate investigation requires that the merchandise used in the comparison be as similar as possible. Furthermore, there is a statutory preference for comparison of most similar, if not identical merchandise for the purpose of foreign market value ("FMV") calculations. 19 U.S.C. § 1677(16); *see Timken Co. v. United States ("Timken I")*, 10 CIT 86, 96, 630 F. Supp. 1327, 1336 (1986). Undoubtedly, Commerce's fundamental objective in an antidumping investigation is to compare the United States price of imported merchandise with the value of "such or similar merchandise" sold in the foreign market. *Timken I*, 10 CIT at 95, 630 F. Supp. at 1336.

Thus, contrary to the assertion of Torrington, the statute does not require Commerce to use a methodology that identifies the greatest number of matches of similar merchandise.

Further, when comparing merchandise which is similar, 19 U.S.C. § 1677b(a)(4)(C) (1988) directs Commerce to adjust foreign market value for differences in merchandise being compared.

In this administrative review, Commerce determined what constituted "similar merchandise" for purposes of comparing U.S. and foreign market sales by grouping bearings into families based upon eight defined physical characteristics. Commerce also employed a 20% difmer cap so that bearings having a greater than 20% difference in their variable costs of manufacture would not be treated as "similar." *Final Results*, 57 Fed. Reg. at 28,364–67.

This Court finds that Commerce's action was within the broad discretion it is granted to determine "similar merchandise". *See SKF USA Inc. and SKF Industrie, S.p.A. v. United States*, 19 CIT ____, ____, Slip Op. 95–6 at 5–9 (January 20, 1995). Its action on this issue was in accordance with law and supported by substantial evidence and is hereby affirmed.

2. *U.S. Inland Insurance Expense Adjustment:*

SKF contests Commerce's adjustment of USP for U.S. inland insurance expense. First, SKF claims that the expense was insignificant and should therefore have been disregarded, pursuant to 19 C.F.R.

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[1] 19 U.S.C. § 1677(16) (1988) provides:

The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purpose of part II of this subtitle can be satisfactorily made:

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.

§ 353.59(a) (1992). SKF asserts its U.S. inland insurance rate to be well within the guideline provided in 19 C.F.R. § 353.59(a). Second, SKF asserts Commerce inappropriately applied BIA. SKF states it omitted the requested information from the computer tape because it considered it insignificant, but reported the information in its Section B narrative response. SKF states Commerce unreasonably resorted to BIA because Commerce accepted SKF's reporting both in the first review and in the preliminary results of the second review and did not request SFK to supplement or correct its reporting. Finally, SKF alternatively argues that if the adjustment was warranted, Commerce used the incorrect information by applying the insurance rate to unit price even though it had been reported as a percentage of inventory value. *SKF's Brief* at 24–28.

SKF requests a remand with instructions to Commerce to either disregard SKF's U.S. inland insurance or apply its rate to the reported base of inventory value. *Id.*

Commerce's position is that the adjustment was reasonable and that its use and choice of BIA was reasonable as well, since SKF failed to provide the information requested. Commerce asserts it alone has the discretionary authority to disregard insignificant adjustments pursuant to 19 C.F.R. § 353.59 (a) and, as there was clear evidence that inland insurance expenses existed, Commerce properly adjusted for it. Commerce also claims its use of BIA was appropriate since it requested that SKF report the information under appropriately labeled variables. Although SKF did report the amount of inland insurance expense in its narrative response, it specifically refused to include the information in its computer tapes. Commerce asserts such non-compliance justifies the use of BIA and its choice of BIA (the U.S. inland insurance rate reported in SKF's narrative submission to unit prices less billing adjustments) was reasonable. *Defendant's Brief* at 16–20.

Defendant-intervenors Torrington and Federal-Mogul echo the arguments made by Commerce, pointing out that SKF had five months in which to correct the submitted information. *Torrington's Brief* at 13–18; *Federal-Mogul's Brief* at 4–8.

19 U.S.C. § 1677f–1(a) (1988) provides:

> For the purpose of determining United States price or foreign market value under sections 1677a and 1677b of this title, and for purposes of carrying out annual reviews under section 1675 of this title, the administering authority may—
>
> * * * * * * *
>
> (2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

(Emphasis added.)

19 C.F.R. § 353.59 (a) states:

> The Secretary *may* disregard adjustments to foreign market value which are insignificant. *Ordinarily*, the Secretary will disregard individual adjustments having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having

> an *ad valorem* effect of less than 1.0 percent, of the foreign market value.

(Emphasis added.)

Thus, the statute provides not only that Commerce is the appropriate authority to determine whether an adjustment is insignificant, but also that it is Commerce that has the discretion to determine whether or not to disregard an insignificant adjustment. This Court therefore finds that it was properly within Commerce's discretion to determine whether the adjustment at issue was insignificant and whether or not to disregard it. *SKF USA Inc.*, 19 CIT at ____, Slip Op. 95–6 at 11.

SKF assigned "zero" to its U.S. inland insurance variable on its computer tape. As a result, Commerce determined that:

> * * * SKF understated the amounts of U.S. inland insurance on its computer tape. We have used the factor provided by SKF [in the narrative portion of its questionnaire response] to calculate U.S. inland freight and deducted this amount from U.S. price for the final results.

Final Results, 57 Fed. Reg. at 28,398.

The antidumping statute provides that, whenever a party refuses or is unable to provide information requested in a timely manner and in the form required, Commerce shall use BIA. 19 U.S.C. § 1677e(c) (1988). In this case, however, the record reveals that Commerce had not requested this information or, more accurately, instructed SKF not to report it on its computer tapes having reported it in its narrative response. Commerce's questionnaire specifically instructed:

> * * * omit any expense item for which the values for all sales are derived by applying the same factor or percentage to the value of another item. For example, if the per-unit direct advertising expense amount is derived for all ESP sales by multiplying the unit price by three percent, do not include the direct advertising variable in your computer listing. Provide the factor or percentage, and the basis to which it should be applied, in your narrative response.

Public Document No. 26, frame 1721, p. 15. U.S. inland insurance expense was exactly such an expense item, reported as a percentage. SKF complied with the instructions, providing in its narrative response the applicable percentage and the item against which the percentage should be multiplied. It is uncontroverted that SKF provided this information in its narrative response. Therefore, this Court finds that Commerce should not have resorted to BIA. *See SKF USA Inc.*, 19 CIT at ____, Slip Op. 95–6 at 12.

Having determined that it was not for SKF to decide whether its expense was insignificant or should be disregarded and that Commerce should nonetheless not apply BIA, this Court must determine what information should be applied for SKF's U.S. inland insurance expense. Although SKF reported that the correct base to which SKF's insurance rate should be applied was inventory value, Commerce applied the rate to unit price, calling it BIA. Commerce provided no explanation for

choosing price over value or for rejecting the information provided by SKF. Upon consideration of the record, this Court can find no reason that Commerce should have chosen a price base in place of the cost base provided. Therefore, this Court finds that Commerce's application of the U.S. inland insurance rate reported in SKF's narrative sub mission to the unit price less billing adjustments was not supported by substantial evidence. *See SKF USA Inc.*, 19 CIT at ____, Slip Op. 95–6 at 13. This issue is remanded for Commerce to apply SKF's U.S. inland insurance rate to inventory value.

3. *Billing Adjustments:*

SKF asserts Commerce improperly disallowed certain of SKF's home market billing adjustments as direct adjustments to foreign market value. These adjustments were reported on a customer-specific basis because SKF was unable to report them on a transaction-specific or product-specific basis. SKF asserts that, after accepting SKF's billing adjustments at verification and in its preliminary results, Commerce abused its discretion by later rejecting them. *SKF's Brief* at 28–32.

Commerce responds that it properly rejected the direct adjustments because they were not reported on a transaction-specific basis. Commerce treated adjustments which were allocated upon a customer-specific basis as indirect selling expenses. *Defendant's Brief* at 20–23. Federal-Mogul agrees with the position taken by Commerce. *Federal-Mogul's Brief* at 8–9.

Torrington agrees that Commerce properly disallowed a direct adjustment to FMV, but argues that Commerce erred in allowing even an indirect adjustment to FMV for billing adjustments because they could not be identified to particular sales transactions or be limited to in-scope merchandise. *Torrington's Brief* at 18–22.

Commerce explained its methodology:

> The Department has treated home market discounts, rebates and price adjustments as *direct* expenses if they could be traced on a transaction-specific basis. This includes adjustments that were incurred as a fixed and constant percentage of sales price over all sales and were reported on a customer- or product-specific basis. If these adjustments were not fixed and constant but reported on a customer-specific basis, they were treated as *indirect* expenses. If the discounts, rebates and price adjustments could not be traced on a customer-specific basis, *no adjustment* was made. Although we allowed customer-specific allocations on home market sales in the first reviews, we have reconsidered our position and decided to allow only price adjustments which were tied to specific sales under comparison. In this way, we avoid applying reductions to FMV for sales that did not actually incur those reductions.

Final Results, 57 Fed. Reg. at 28,400 (emphasis added).

Commerce makes adjustments for discounts, rebates and other billing adjustments pursuant to 19 U.S.C. § 1677a (1988) and 19 U.S.C. § 1677b (1988), which require it to determine what price was actually charged for subject merchandise. *See Torrington Co. v. United States*, 17

CIT ____, ____, 818 F. Supp. 1563, 1578–79 (1993). More specifically, the Federal Circuit has held that, to allow an adjustment to FMV, it must be directly correlated with specific in-scope merchandise on the basis of actual costs. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1580 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

This Court affirms Commerce's decision to deny direct adjustments to FMV for home market billing adjustments because SKF did not report them on a transaction-specific basis and they were not a fixed and constant percentage of sales price over all sales. *See SKF USA Inc.*, 19 CIT at ____, Slip Op. 95–6 at 22. As to Commerce's decision to treat billing adjustments as indirect selling expenses when reported on a customer-specific basis, this Court finds, as it has done in the past, that methodology to be reasonable and in accordance with law. *See Torrington Co. v. United States*, 17 CIT ____, ____, 832 F. Supp. 365, 377 (1993), *modified, in part, remanded*, 18 CIT ____, 850 F. Supp. 7 (1994). Therefore, this Court affirms Commerce's action as to this issue.

CONCLUSION

For the foregoing reasons, this case is remanded to Commerce for application of SKF's U.S. inland insurance rate to inventory value. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 95–9)

KERN-LIEBERS USA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND U.S. STEEL GROUP—A UNIT OF USX CORP., BETHLEHEM STEEL CORP., NATIONAL STEEL CORP., WCI STEEL, INC., GULF STATES STEEL, INC. OF ALABAMA, LTV STEEL CO., INC., AK STEEL CORP., INLAND STEEL INDUSTRIES, INC., AND SHARON STEEL CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 93–09–00552

[ITC determination as to flat cold-rolled carbon steel sustained.]

(Dated January 27, 1995)

Porter, Wright, Morris & Arthur (Leslie Alan Glick and *Richard J. Burke)* for plaintiff Kern-Liebers USA, Inc.

Dewey Ballantine (Alan Wm. Wolff, Michael H. Stein, Linda C. Menghetti and *Joseph A. Black)* and *Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan* and *Stephen Narkin)* for plaintiffs and defendant-intervenors U.S. Steel Group—A Unit of USX Corporation, Bethlehem Steel Corporation, AK Steel Corp., Gulf States Steel, Inc. of Alabama, Inland Steel Industries, Inc., LTV Steel Company, Inc., National Steel Corporation, Sharon Steel Corporation, Geneva Steel, Laclede Steel Company, and WCI Steel, Inc.

Morrison & Foerster (Donald B. Cameron, Julie C. Mendoza, Alan K. Palmer, Neal J. Reynolds, G. Brian Busey, Craig A. Lewis, M. Diana Helweg and *Sue Lynn Koo)* for plaintiffs and defendant-intervenors Dongbu Steel Co., Ltd., Pohang Iron & Steel Co., Ltd., Pohang Coated Steel Co., Ltd., Pohang Steel Industries Co., Ltd., and Union Steel Manufacturing Co., Ltd.

Sharretts, Paley, Carter & Blauvelt, P.C. (Gail T. Cumins), *Ned H. Marshak* and *Beatrice A. Brickell,* of counsel, for plaintiffs and defendant-intervenors Thyssen Stahl AG, Thyssen Steel Detroit Co., Thyssen Inc., Preussag Stahl AG, Klöckner Stahl GmbH, Fried. Krupp AG Hoesch-Krupp, and Krupp-Hoesch Stahl AG.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis and *Elizabeth C. Hafner)* for plaintiffs and defendant-intervenors Hoogovens Groep BV and N.V.W. (U.S.A.), Inc.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Deputy General Counsel, United States International Trade Commission *(Cynthia P. Johnson, Judith Czako, Scott D. Andersen* and *James M. Lyons)* for defendant.

Willkie Farr & Gallagher (William H. Barringer, Christopher A. Dunn, Matthew R. Nicely and *Nancy A. Fischer)* for defendant-intervenors NKK Corporation, Kawasaki Steel Corporation, Kobe Steel, Ltd., Nippon Steel Corporation, Nisshin Steel Co., Ltd., Sumitomo Metal Industries, Ltd., and Stelco, Inc.

Barnes, Richardson & Colburn (Gunter von Conrad and *Peter A. Martin)* for defendant-intervenor Voest Alpine Stahl, A.G.

Cameron & Hornbostel (William K. Ince) for defendant-intervenor Sidbec-Dosco, Inc.

Dickstein, Shapiro & Morin (Arthur J. Lafave III and *Douglas N. Jacobson)* for defendant-intervenor Companhia Siderurgica Nacional S.A.

George v. Egge Jr., P.C. (George v. Egge Jr.) for defendant-intervenor Empresa Nacional Siderúrgica, S.A.

Mudge Rose Guthrie Alexander & Ferdon (David P. Houlihan, Richard G. King and *Gregory J. Spak)* for defendant-intervenor Propulsora Siderurgica S.A.I.C.

O'Melveny & Myers (Bruce R. Hirsh and *Gary N. Horlick)* for defendant-intervenors Sidmar N.V. and TradeARBED, Inc.

Rogers & Wells (William Silverman, Carrie A. Simon and *Ryan Trainer)* for defendant-intervenors Dofasco, Inc., ILVA, S.p.A. and ILVA USA, Inc.

Weil, Gotshal & Manges (A. Paul Victor) for defendant-intervenors Usinor Sacilor and Sollac.

OPINION

RESTANI, *Judge:* This matter is before the court on several motions for judgment upon the agency record pursuant to USCIT Rule 56.2. These motions have been brought by (1) Kern-Liebers USA, Inc. ("Kern-Liebers"), (2) Bethlehem Steel Corporation, AK Steel Corp., Gulf States Steel, Inc. of Alabama, Inland Steel Industries, Inc., LTV Steel Company, Inc., National Steel Corporation, Sharon Steel Corporation, U.S. Steel Group—A Unit of USX Corporation, Geneva Steel, Laclede Steel company, and WCI Steel, Inc. (collectively "petitioners"), (3) NKK corporation, Kobe Steel, Ltd., Nippon Steel Corporation, Nisshin Steel Co., Ltd., Sumitomo Metal Industries, Ltd., Kawasaki Steel Corporation, Stelco, Inc., Pohang Iron & Steel Co., Ltd., Preussag Stahl AG, Klöckner Stahl GmbH, Krupp-Hoesch Stahl AG, Fried. Krupp AG Hoesch-Krupp, Thyssen Stahl AG, Sidmar N. V., TradeARBED, Inc., Hoogovens Groep BV, N.V.W. (U.S.A.), Inc., Sidbec-Dosco, Inc., Dofasco, Inc., ILVA S.p.A., ILVA USA, Inc Usinor Sacilor, Sollac, Propulsora Siderurgica S.A.I.C., Voest Alpine Stahl, A.G., Companhia Siderurgica Nacional S.A. and Empresa Nacional Siderurgica, S.A. (collectively "respondents") (4) Dongbu Steel Co., Ltd., Pohang Iron & Steel Co., Ltd., Pohang Coated Steel Co., Ltd., Pohang Steel Industries Co., Ltd., and Union Steel

Manufacturing Co., Ltd. (collectively "Dongbu"), (5) Hoogovens Groep BV and N.V.W. (U.S.A.), Inc. (collectively "Hoogovens"), and (6) Thyssen Stahl AG, Thyssen Steel Detroit Co., Thyssen Inc., Preussag Stahl AG, Klöckner Stahl GmbH, Fried. Krupp AG Hoesch-Krupp and Krupp-Hoesch Stahl AG (collectively "Thyssen"). To facilitate adjudication of the issues, the court has consolidated various separate challenges to the determination of the United States International Trade Commission (the "Commission") in *Certain Flat-Rolled Carbon Steel Prods. from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, The Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom,* 58 Fed. Reg. 43,905 (USITC 1993) (final determs.).[1]

BACKGROUND

On June 30, 1992, petitioners filed with the International Trade Administration of the United States Department of Commerce ("Commerce") and the Commission petitions alleging that an industry in the United States was materially injured or threatened with material injury by reason of subsidized and/or less than fair value ("LTFV") imports of certain flat-rolled carbon steel products. The petitions covered four classes of flat-rolled carbon steel imports from 21 countries—cut-to-length plate, hot-rolled, cold-rolled and corrosion-resistant steel products. At issue in the present case are the cold-rolled flat-rolled carbon steel ("cold-rolled steel") products.

Commerce defined the scope of the investigation of cold-rolled steel products as

> cold-rolled (cold-reduced) carbon steel flat products, of solid rectangular (other than square) cross section, of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished or coated with plastics or other nonmetallic substances, in coils, or in straight lengths which, if of a thickness less than 4.75 millimeters, are of a width measuring at least 10 times the thickness or if of a thickness of 4.75 millimeters or more are of a width which exceeds 150 millimeters and measures at least twice the thickness.

Certain Cold-Rolled Carbon Steel Flat Prods. from Various Countries, 57 Fed. Reg. 33,488, 33,491 (Dep't Comm. 1992) (init. of antidumping duty investigations); *see Certain Flat-Rolled Carbon Steel Prods. from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, The Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom,* USITC Pub. 2664, Inv. Nos. 701–TA–319–332, 334, 336–342, 344, and 347–353, and Inv. Nos. 731–TA–573–579, 581–592, 594–597, 599–609, and 612–619, vol. I, at 85 (Aug. 1993) (final determs. and views) *("Final Det.").*

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[1] The Commissioners rendering this determination were chairman Newquist, Vice Chairman Watson, and Commissioners Rohr, Brunsdale, Crawford and Nuzum. As the Chairmanship and Vice Chairmanship positions have since changed, each member of the Commission shall be referred to as "Commissioner."

On August 21, 1992, the Commission, in its preliminary determination, found that there was reasonable indication that an industry in the United States was materially injured or threatened with material injury by reason of allegedly subsidized and/or LTFV imports of cold-rolled steel products from Argentina, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Korea, The Netherlands and Spain. *Certain Flat-Rolled Carbon Steel Prods.*, 57 Fed. Reg. 38,064, 38,064–65 (USITC 1992) (prelim. determs.). Following preliminary determinations by Commerce finding subsidized and LTFV imports of such merchandise from the subject countries,[2] the Commission commenced investigations to determine the extent of injury to the domestic flat-rolled steel industry. On August 18, 1993, the Commission published the results of its investigations.

All Commissioners agreed that the domestic cold-rolled steel industry was not materially injured by reason of the subject imports.[3] The Commission determined, however, that the domestic industry was threatened with material injury by reason of subsidized or LTFV cold-rolled imports from Germany, Korea and The Netherlands.[4] 58 Fed. Reg. at 43,905–06. Further, the majority determined that the domestic industry was not materially injured or threatened with material injury by reason of subsidized or LTFV cold-rolled imports from Argentina, Austria, Belgium, Brazil, Canada, France, Italy, Japan and Spain.[5] *Id.* at 43,906–07.

Kern-Liebers challenges the Commission's like product determination as to its product, cold-rolled seat belt retractor steel. Petitioners challenge the majority's negative threat determinations with respect to Belgium, Brazil, Canada, France, Italy and Japan. Defendant and respondents oppose petitioners' challenge and ask the court to uphold the Commission's negative material injury and threat determinations. Separate challenges have been brought by Dongbu, Hoogovens and Thyssen contesting the Commission's determination that subsidized and/or LTFV cold-rolled steel imports from their respective countries, Korea, The Netherlands and Germany, threaten the domestic cold-rolled steel industry with material injury. Defendant and petitioners oppose these three challenges.

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[2] *See Certain Steel Prods.*, 57 Fed. Reg. 57,739–85, 57,799–806 (Dep't Comm. 1992) (prelim. affirmative countervailing duty determs. for Austria, Belgium, Brazil, France, Germany, Italy, Korea and Spain); *Certain Cold-Rolled Carbon Steel Flat Prods.*, 58 Fed. Reg. 7066, 7073–85, 7091–106, 7113, 7120 (Dep't Comm. 1993) (prelim. determs. of LTFV sales from Argentina, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Korea, The Netherlands and Spain). On July 9, 1993, Commerce published its final determinations finding subsidized/LTFV imports of cold-rolled steel from the subject countries. *Certain Steel Prods.*, 58 Fed. Reg. 37,217–338, 37,374 (Dep't Comm. 1993) (final affirmative countervailing duty determs. for Austria, Belgium, Brazil, France, Germany, Italy, Korea and Spain) ; *certain Cold-Rolled Carbon Steel Flat Prods.*, 58 Fed. Reg. 37,062, 37,082–99, 37,125–76, 37,199, 37,211 (Dep't Comm. 1993) (final determs. of LTFV sales from Argentina, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Korea, The Netherlands and Spain).

[3] Commissioner Newquist found that the domestic industry was not suffering material injury, *see Final Det.* at 102 n.125, 293, thus he did not apply a causation analysis to determine whether the industry was materially injured by reason of the subject imports.

[4] Commissioners Brunsdale and Crawford dissented as to Germany, Korea and The Netherlands. Commissioner Watson dissented as to Korea and The Netherlands.

[5] Commissioner Newquist and Commissioner Nuzum dissented as to Belgium, Brazil and France. Commissioner Newquist further dissented as to Canada and Japan. Commissioner Nuzum further dissented as to Italy and Spain. Commissioner Rohr dissented as to Canada. Commissioner Watson did not participate in the voting for Italy.

STANDARD OF REVIEW

In reviewing final determinations in countervailing and antidumping duty investigations, the court will hold unlawful those determinations of the Commission found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988).

DISCUSSION

I. *Like Product:*

Pursuant to 19 U.S.C. § 1677(10) (1988), the Commission is required to specify "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation."[6] The bases upon which a like product determination is made "fall [ ] within the Commission's broad discretion and expertise in conducting investigations" and may depend upon the unique facts of each case. *Chung Ling Co. v. United States,* 16 CIT 636, 647, 805 F. Supp. 45, 54 (1992); *Asociacion Colombiana de Exportadores de Flores v. United States,* 12 CIT 634, 638, 693 F. Supp. 1165, 1169 (1988).

The Commission, in the final determination, considered four major like product groupings established by Commerce's scope determinations.[7] In addressing separate like product challenges, the Commission stated that it "considered the asserted grounds for distinguishing various products in the context of the 'continuum' nature" of products in the cold-rolled steel like product grouping. *Final Det.* at 12. The Commission concluded that such a continuum properly reflected the "significant versatility of various carbon steel products that permit a wide variety of end uses." *Id.* The Commission further noted that

> [t]he Commission traditionally has been reluctant to fragment its like product definitions where a continuum of products exists. To do so would result in a large number of separate, specialized steel like products characterized by distinct metallurgy, end uses, and customer perceptions, and would ignore the need to identify 'clear dividing lines' between potential separate like products.

Id. at 11–12 (footnotes omitted).

In the final determination, the Commission found that seat belt retractor steel produced by Kern-Liebers was not a like product separate from other types of cold-rolled steel products subject to the investigation. *Id.* at 93–94. Seat belt retractor steel is a specialty hardened carbon steel used to make seat belt retractor springs. *Id.* at 93. Although the Commission noted that this steel, unlike other high carbon steel, was heat treated prior to being cold-rolled, the Commission found that this product had the same production processes, facilities and workers

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[6] Factors that the Commission typically considers in defining "like product" include (1) physical characteristics and uses, (2) interchangeability of the products, (3) channels of distribution, (4) customer and producer perceptions of the products, (5) the use of common manufacturing facilities and personnel, and (6) price. *See Calabrian Corp. v. United States,* 16 CIT 342, 346 n.4. 794 F. Supp. 377, 382 n.4 (1992).

[7] The Commission found four major like products—hot-rolled flat products, cold-rolled flat products, corrosion-resistant flat products and cut-to-length plate flat products. *Final Det.* at 11 & n.13. The parties to the investigation did not challenge the basic definitions of these products. *Id.*

as that of other types of cold-rolled steel products. *Id.* at 93–94. The Commission further determined that the subject product was not distinguishable from other types of specialty or niche cold-rolled steel products that (1) have particular end uses, (2) were primarily distributed to end users, and (3) were sold with a price premium reflecting the "considerably greater energy usage required to produce these steels." *Id.* at 94.

Kern-Liebers does not contest that its product is made of cold-rolled steel. Rather, Kern-Liebers contends that its product is a more specialized carbon steel product with distinct qualities such as higher tensile strength,[8] superior cleanliness, unique uses, and a lack of interchangeability with other products, warranting a separate like product determination. Although this may be so, such qualities do not distinguish seat-belt retractor steel from other types of specialized cold-rolled steel products. Further, in addressing like product challenges, the Commission considered numerous specialty (niche) products that did not have identical matches in the domestic industry. *See id.* at 86–94. Separate like product categories were not carved out for these products.

Kern-Liebers also argues that because seat belt retractor steel is sold primarily to end-users, it is sold through channels of distribution different from those for other cold-rolled steel products. This fact, however, does not distinguish Kern-Liebers' product. The Commission found that, in general, specialty (niche) high-carbon products are primarily sold directly to end-users. *Id.* at 94.

Finally, Kern-Liebers contends that seat belt retractor steel is required to meet the Federal Motor Vehicle Specification 209 safety standard, thus a clear dividing line exists for separate like product classification. The court does not find this argument compelling. The fact that a particular specialty (niche) product may be dedicated to a specific and unique use may be considered, but is not necessarily determinative of whether a separate like product determination is warranted in this case. *See Asociacion Colombiana,* 12 CIT at 637–38, 693 F. Supp. at 1168–69 (noting that ITC like product determination depends upon unique facts of each case, though specific use is not, as matter of law, inappropriate as one of bases for like product distinction).

The court finds the distinctions drawn by Kern-Liebers constitute "minor differences" and do not merit a separate like product determination. *See Cambridge Lee Indus., Inc. v. United States,* 13 CIT 1052, 1055, 728 F. Supp. 748, 750–51 (1989) (noting that like product determination should not be narrowly interpreted "'as to permit minor differences in physical characteristics or uses to lead to the conclusion that the [domestic] product and [the imported] article are not "like" each other'") (quoting S. Rep. No. 249, 96th Cong., 1st Sess. 90–91 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 476–77). In this case, reliance on end use would lead to an excessively broad exclusion of other specialty

[8] Kern-Liebers claims that the production equipment it uses to create tensile strength, a 20–1011 Senzimir type rolling machine, is not used by the domestic industry, which uses a 4-roll quarto type rolling machine. Kern-Liebers' Not. J. Agency R. at 11 (Kern-Liebers' moving brief is entitled "Pre-Hearing Brief").

(niche) products that are dedicated to particular uses. Thus, the Commission's determination that seat belt retractor steel was within the upper range of the continuum of cold-rolled steel products is supported by substantial evidence.[9]

II. *Captive Production:*

In the final determination, the Commission included "captively consumed" cold-rolled steel production, used for further processing into downstream products,[10] in its assessment of the domestic cold-rolled steel industry. In part, petitioners raise the same arguments advanced in their challenge to the Commission determination in *U.S. Steel Group v. United States,* Slip. Op. 94–201, at 11–19 (Dec. 30, 1994). There the Commission had included hot-rolled captive production in its assessment of the domestic hot-rolled steel industry. *See Final Det.* at 18. To the extent that those arguments have been decided in *U.S. Steel Group,* the court will not revisit them here. The court, however, will address petitioners' additional arguments concerning profitability calculations.

Petitioners contest the Commission's decision to estimate the profitability of captive transfers. Specifically, petitioners contend that by doing so the Commission created "fictitious" losses for captive production, thus masking the potential contribution of imports to material injury. Petitioners assert that the subject imports compete only with the merchant market portion of the domestic industry, not the captive portion, thus all losses are attributable to merchant market sales. According to petitioners, the Commission should have valued captive transfers at their cost of production ("COP") to arrive at zero losses for the captive production sector, rather than estimating profitability for this sector.

Under the statute, the Commission, in assessing impact of imports on the state of the domestic industry, must consider, *inter alia,* any declines in profits "within the context of the business cycle and conditions of competition that are distinctive to the [domestic] industry." 19 U.S.C. § 1677(7)(C)(iii) (1988). For this purpose, it is the Commission's practice, where a significant portion of domestic production is captively consumed, to estimate the profitability of transferred products in order to project the profitability of total domestic production.[11] *See Stainless Steel Wire Rod from Brazil, France, and India,* USITC Pub. 2599, Inv.

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[9] Kern-Liebers further contends that there is no domestic producer of seat belt retractor steel, thus its product cannot be causing threat to any U.S. industry. If seat belt retractor steel were found to be unlike other cold-rolled steel products, the lack of a domestic producer would be dispositive. However the court finds the Commission's single like cold-rolled product determination to be supported by substantial evidence, thus this issue is not reached.

[10] Approximately one-half of all domestic cold-rolled steel shipments was "consumed internally by integrated producers in the production of downstream products," mainly for corrosion-resistant steel products. *Final Det.* at 15 & n.37; Def.'s Conf. App., vol. 3, List 2, Doc. 216 at I–50 tbl. 9 *in* Defendant's Appendix vol. IV, *U.S. Steel Group,* Slip Op. 94–201 (Dec. 30, 1994) ("Conf. Staff Rpt.").

[11] Subsequent to oral argument, petitioners raised the argument that the Commission's determination in *Fresh Garlic from the People's Republic of China,* USITC Pub. 2825, Inv. No. 731–TA–683 (Nov. 1994) (final) (*"Fresh Garlic"*), demonstrates that the Commission need not have constructed financial data for cold-rolled captive transfers, but rather could have valued captive transfers at cost. The circumstances in *Fresh Garlic,* however, are distinguishable from the present case. The Commission found that there was "no reliable basis to value" raw garlic intended for production of dehydrated ("dehy") garlic, which is almost entirely consumed internally. *Id.* at I–22, II–35 & n.89. Supporting the Commission's conclusion was the fact that (1) there were no reported sales of dehy garlic and (2) dehydrated garlic producers were unable to segregate financial data with regard to dehy garlic production. *Id.* at I–23, II–35 &

continued

Nos. 731–TA–636–638, at 1–19 (Feb. 1993) (prelim.); *see also Tungsten Ore Concentrates from the People's Republic of China,* USITC Pub. 2447, Inv. No. 731–TA–497, at 10 & n.48, A–28–A–30 (Nov. 1991) (final) (employing analysis of domestic producers' profitability estimates for captive production, with adjustments). Because the Commission's assessment of the domestic industry properly includes the captive production within the like product definition, *see U.S. Steel Group,* Slip. Op. 94–201, at 13–14, 16, the court finds that the Commission's decision to estimate the profitability of captive transfers to be reasonable.[12]

The court further rejects the petitioners' challenges to the Commission's selection and application of its methodology. In the final investigation, petitioners adamantly refused to provide any information with regard to the valuation of internal transfers, including sales value, operating income or cash flow. Pet'rs' Reply Br. at 62 & n.140; Letter to Lynn Featherstone from John Mangan and Michael H. Stein, List 2, Doc. 301GG at 2 (Jan. 21, 1993). As a result, the Commission collected data "on the profitability of trade sales and [COP] for both trade sales and transfers," U.S. Int'l Trade Comm., Certain Flat-Rolled Carbon Steel Products: Final Report to the Commission at I–35 tbl. 9, I–64 (1993) ("Pub. Staff Rpt."); *see* Pet'rs' Reply Br. at 62–63, and, although acknowledging that other methodologies existed, estimated the profitability of captive transfers based on a methodology selected as appropriate "to achieve a fair presentation of the data."[13] Pub. Staff. Rpt. at I–64.

Petitioners' contention that the unit value figures of "company transfers" from hot-rolled production must equal the COP figures of transfers "from hot-rolled operations" used in cold-rolled production is

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n.89. Thus, the Commission used the product line exception in 19 U.S.C. § 1677(4)(D) (1988) to examine the financial data of the narrowest group of products that contained the like product at issue, in this case the dehydrated garlic industry. *Fresh Garlic* at I–23.

In the present case, nearly one-half of all cold-rolled production involved reported merchant market sales. Conf. Staff Rpt. at I–50 tbl. 9. Further, domestic producers provided reliable COP data for captive transfers. Thus, the court finds that there existed a reasonable and reliable basis for the Commission to value cold-rolled captive production. Finally, petitioners' argument that *Fresh Garlic* indicates that the Commission should have made separate like product determinations for captively-consumed steel is without merit. *U.S. Steel Group,* Slip Op. 94–201, at 15 n.6.

[12] The court rejects petitioners' additional argument that *Certain Calcium Aluminate Cement and Cement Clinker from France,* USITC Pub. 2772, Inv. No. 731–TA–645 (May 1994) (final), provides a basis for the Commission to exclude captive production in its assessment of the domestic industry in this case. In that determination, the Commission found cement clinker destined to become calcium aluminate cement to constitute a separate like product from cement clinker production for use as flux, based on differences in chemical compositions, end uses, channels of distribution and customer perceptions. *Id.* at I–7 & n.14. The two types of clinker, however, were initially treated as separate classes of merchandise in Commerce's scope determination, without challenge. *Id.* at I–5–I–6.

In the present case, petitioners filed its petitions *without* distinguishing between merchant market and captive production. As the court stated in *U.S. Steel Group,* Slip. Op. 94–201, at 16, the like product definition is determinative of the industry to be examined. *See* 19 U.S.C. § 1677(4) (A); *Asociacion Colombiana,* 12 CIT at 636, 693 F. Supp. at 1167 (finding identification of like product necessary to determine which industry is examined for injury or threat of injury). Thus, petitioners' argument is without merit.

[13] The Commission calculated the profitability value for captive transfers using the following methodology:

> 1. The transfer value was the average for each firm of that firm's average per-ton trade sale unit value for each annual period, adjusted for any cost differentials between trade and transfer product. The transfer value used for some companies was less than the average unit value for trade sales because the captively consumed product did not go through the same final stages of production as the sold product, and was not allocated all the relevant fixed costs * * *. Verification adjustments of the large producers have generally added fixed expenses to the transferred products so that dissimilarities in cost relate primarily to actual processing differences.
>
> 2. The cost of transferred products was requested in the COP data and was used as the cost of goods sold. The underprocessing of the transferred product is adjusted by the lower transfer value.
>
> 3. No additional selling expense was allocated to the transferred product; however, general and administrative (G&A) expense was allocated based on the per-ton G&A expense of trade sales.

Pub. Staff Rpt. at I–64.

without merit. *Compare* Pub. Staff Rpt. at I–73 tbl. 29 *with id.* at I–78 tbl. 34. As indicated, the court rejects this view. *See* discussion, *supra,* at pp. 12–15. Further, the higher figures for company transfers cover values for (1) transfers for internal consumption in the production of other subject products, (2) transfers for internal consumption in the production of other products produced by the plant, (3) internal consumption as is, and (4) transfers to affiliates. Pub. Staff Rpt. at I–65 n.127.[14]

Based on the record, the court does not find that the Commission erred in the selection of its methodology, nor does it find the conclusions reached by the Commission as to treatment of captive production to be unsupported by substantial evidence. *See. e.g., NTN Bearing Corp. v. United States,* Slip. Op. 94–96, at 9 (June 8, 1994) (concluding agency had broad discretion in choice of methodology employed to fulfill its statutory mandate).

III. *Present Material Injury:*

A. *Causation Analysis:*

Petitioners contend that the causation analyses of Commissioners Brunsdale and Crawford are not in accordance with law, and that Commissioner Watson's analysis is impermissibly vague. Petitioners raise the same arguments advanced in challenges to the Commission determination in *U.S. Steel Group*, Slip. Op. 94–201, at 45–46. The court has found no error in the standards applied by the Commissioners' for their causation analyses. *Id.* at 46–48.

B. *Negligibility for Cumulation Purposes:*

Pursuant to 19 U.S.C. § 1677(7)(C)(iv) (Supp. V 1993),[15] the majority cumulated non-negligible imports from six countries: Brazil, Canada, Germany, Japan, Korea and The Netherlands. *Final Det.* at 108–09, 116. Imports from Argentina, Austria, Belgium, France, Italy, South Africa and Spain were found to be negligible and thus were not cumulated for the majority's material injury analysis. *Id.* at 109–14, 116–18.

Petitioners contest the majority's application of the negligibility exception of the cumulation provision as contrary to law and legislative intent. First, the interpretation and application of the negligibility exception in these investigations by the various Commissioners who made negative findings, although not uniform, are in accordance with law. *U.S. Steel Group,* Slip. Op. 94–201, at 31–33. Second, the court rejects petitioners' contention that *any* evidence of adverse impact, in

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[14] Petitioners further assert that the Commission erred in its calculations of operating income and loss for total cold-rolled operations. *See* Pub. Staff. Rep. at I–79 tbl. 35. Petitioners contend that the Commission assigned a higher per-ton G&A expense to captive transfers than that required by the Commission's stated methodology, *see supra* note 13, thereby exaggerating the losses of the captive portion of the domestic industry. Even if correct, the court does not find this error to be prejudicial, as merchant market G&A expenses were unaffected. Further, the Commission stated that "[e]ven in the merchant market sector of the domestic industry, cumulated imports have not had a significant impact on the domestic industry because of their limited substitutability resulting from quality and other nonprice factors." *Final Det.* at 130 n.348. Thus, the Commission considered the impact of the subject imports on the merchant market, where imports competed more directly, to be insufficient to warrant an affirmative material injury determination.

[15] The statute provides that the Commission "shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry." 19 U.S.C. § 1677(7)(c)(iv)(I). Under the negligibility exception to the cumulation provision, the Commission has the discretion not to cumulate countries whose imports "are negligible and have no discernable adverse impact on the domestic industry." *Id.* § 1677(7)(C)(v).

the form of lost sales or underselling, precludes application of the negligibility exception. As the court stated previously, "[t]he determination of no adverse impact is a multifaceted one, and the court will not construct a *per se* rule." *Id.* at 40.

Petitioners further argue that the majority's negligibility findings for Argentina, Austria, Belgium, France, Italy and Spain, are unsupported by substantial evidence. In making its assessment of whether imports are negligible and have a discernible adverse impact, the Commission is to consider all relevant economic factors, including volume, market share, price sensitivity, evidence of underselling and overselling, substitutability, as well as whether imports were isolated and sporadic. *See* 19 U.S.C. § 1677(7)(C)(v). In the present case, the majority reviewed these factors and its application of the negligibility exception is supported by substantial evidence.

The majority found the domestic cold-rolled industry not particularly price sensitive.[16] *Final Det.* at 109. Further, the majority, stressing that no numerical "bright line" was used for determining negligibility, *id.* at 30, found relatively low or stable import volumes and small shares of apparent domestic consumption (which did not exceed 0.5% for any one country) for each of the non-cumulated countries. Pub. Staff Rpt. at I–137 tbl. 95, I–147 tbl. 105. Most countries, however, had neither sporadic nor isolated sales.

For Argentine imports, the percentage share of apparent domestic consumption declined to 0.1% in 1992. Pub. Staff Rpt. at I–147 tbl. 105. The Commission noted that imports from Argentina were "more sporadic than imports from other countries." *Final Det.* at 110. Although there was evidence of mixed underselling and overselling in pricing comparisons, the Commission declined to cumulate Argentina in light of extremely low import volume and market share, the somewhat sporadic nature of sales, and the limited substitutability between Argentine imports and domestic products. *Id.*

With regard to Austrian imports, the Commission found that import volume declined to only 2,330 short tons in 1992, representing statistically insignificant market penetration levels. Pub. Staff Rpt. at I–137 tbl. 95, I–147 tbl. 105. Despite finding one confirmed lost sale and mixed underselling and overselling, the Commission determined that Austrian imports were negligible because of extremely low volume and market share, and somewhat isolated, although not sporadic, sales. *Final Det.* at 110–11.

Belgian import levels declined to 0.4% in 1992 from 0.5% in 1991. Pub. Staff Rpt. at I–147 tbl. 105. Although finding Belgian imports somewhat substitutable with commercial grade domestic products, the Commis-

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[16] Commissioner Rohr found the relevant industry not particularly price sensitive, noting that cold-rolled products "still display[ ] some sensitivity to price but considerably less so than either plate or hot-rolled products." *Final Det.* at 153. Although not reaching a conclusion as to the price sensitivity of the cold-rolled market specifically, commissioner Watson concurred in Commissioner crawford's price sensitivity analysis and found all four like product markets "generally not price sensitive." *Id.* at 32 n.162. Commissioner Crawford found the cold-rolled market "not price sensitive." *Id.* at 342. Commissioner Brunsdale found that the cold-rolled industry was "not so price sensitive." *Id.* at 315. Finally, Commissioner Nuzum found the cold-rolled industry "moderately price sensitive." *Id.* at 362.

sion determined that competition with domestic products was attenuated, on the basis of affidavits produced by Belgian respondents indicating that certain Belgian imports have characteristics not provided by domestic products and that sales were made to customers for unique end use applications. *Final Det.* at 111–12. Petitioners counter that these affidavits were self-serving and that other purchaser responses indicated that Belgian imports were comparable in quality to domestic products. *See* Pet'rs' Mot. J. Agency R. at 52, 55 n.126. Nevertheless, the commission determined that overselling by the Belgian imports in 23 out of 31 pricing comparisons supported its finding that competition was attenuated. *Final Det.* at 112. In light of Belgium's low market share, stable import volume, and the attenuated competition between Belgian imports and domestic products, the Commission determined that Belgian imports were negligible and had no discernible adverse impact on the domestic industry. *Id.*

France's share of apparent domestic consumption similarly fell to 0.4% in 1992 from 0.5% in 1991. Pub. Staff Rpt. at I–147 tbl. 105. Import volumes increased in 1991 to 129,280 short tons before decreasing to 1990 levels in 1992 of 125,290 short tons. *Id.* at I–137 tbl. 95. The Commission found declining import penetration levels and predominant overselling by French imports. *Final Det.* at 113. Further, the Commission noted that a portion of those imports were niche products for which no domestic production was available. *Id.* Although it found evidence of three confirmed lost sales for France, the commission noted that these sales involved very small volumes. *Id.* at 113 n.226. On the basis of low import volume and market share, attenuated competition between French imports and domestic production, and predominant overselling, the Commission found French imports to be negligible. *Id.* at 113.

Italian imports increased its share of apparent domestic consumption in 1992 to 0.2% from 1990 levels of 0.1%, while import volumes rose from 40,992 short tons in 1990 to 47,749 short tons in 1992. Pub. Staff Rpt. at I–137 tbl. 95, I–147 tbl. 105. The Commission also found a significant portion of Italian imports to be of commercial grade quality relatively substitutable with domestic products. *Final Det.* at 114. Further, Italian imports undersold domestic products in all eight pricing comparisons for sales to manufacturers/end-users, and two confirmed lost sales were established, involving 1,750 tons valued at $781,500. *Id.* Nevertheless, because of very low and stable volume, and low market share, the Commission determined that Italian imports were negligible and had no discernible adverse impact on the domestic industry. *Id.*

Spain accounted for a 0.2% share of apparent domestic consumption with an import volume of 32,347 short tons in 1992. Pub. Staff Rpt. at I–137 tbl. 95 & n.1, I–147 tbl. 105. Spanish imports were sold primarily to U.S. steel service or distribution centers and were concentrated in commercial grade quality, with no niche imports reported. *Final Det.* at 117–18. The Commission was persuaded by Spanish respondents' arguments that imports consisted of particular types of steel already planned

for European customers, and thus not produced specifically for the U.S. market. *Id.* at 117. Although the relevance of this finding is unexplained by the Commission, contrary to petitioners' contention, this fact alone does not warrant remand. Although the Commission found Spanish imports to be moderately substitutable, and underselling in 18 out of 19 pricing comparisons, the Commission also determined that based upon Spain's very low volume and market share, Spanish imports were negligible and had no discernible adverse impact on the domestic industry. *Id.* at 118.

The court finds the majority's negligibility findings for the non-cumulated countries to be supported by substantial evidence. Accordingly, the Commission's negligibility determinations for Argentina, Austria, Belgium, France, Italy and Spain are sustained.[17]

C. *Price Sensitivity and Substitutability:*

In the final determination, the majority found that the domestic cold-rolled industry was not particularly price sensitive. *See supra* note 16; *Final Det.* at 122 & n.307. Underlying this conclusion in the Commission's analysis of material injury was its finding that substitutability between cold-rolled products and domestic products is limited. *Final Det.* at 120. Petitioners contend that in past investigations of the carbon steel industry the Commission has found significant price sensitivity and substitutability. In support of this contention, petitioners have cited to numerous Commission investigations from the early 1980's where the commission has found the carbon steel industry to be price sensitive and fungible.[18] Defendant and respondents counter that the Commission is not bound by its prior decisions and that the Commission nonetheless adequately explained its departure from these prior determinations.

The court has found that "'a particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation.'" *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1087 (1988) (quoting *Armstrong Bros. Tool Co. v. United States*, 84 Cust. Ct. 102, 115, C.D. 4848, 489 F. Supp. 269, 279 (1980)). Further, in reaching a determination, the Commission must conduct an independent evaluation of all relevant factors with respect to "the unique economic situation of each product and industry under investigation." *Alberta Pork Producers' Mktg. Bd. v. United States*, 11 CIT 563, 583, 669 F. Supp. 445, 461 (1987). Thus, the Commission is not obligated to follow prior decisions if the

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[17] Petitioners further assert that the Commission improperly relied on "the relatively few confirmations of lost sales [as] further evidence of a lack of a discernable impact." Pet'rs' Reply Br. at 37 & n.87 (citing *USX Corp. v. United States*, 11 CIT 82, 88–94, 655 F. Supp. 487, 493–97 (1987)). Petitioners mischaracterize the commission's consideration of lost sales. In its discussion of specific countries, the majority acknowledged in footnotes, where appropriate, that it could not confirm lost sales or lost revenue allegations. *See, e.g., Final Det.* at 110 n.193. The Commission did not rely exclusively on such facts to find negligibility.

[18] *See, e.g., Certain Carbon Steel Prods. from Spain*, USITC Pub. 1331, Inv. Nos. 701–TA–155, 157–160, and 162, at 16 (Dec. 1982) (final) (noting that "fundamental characteristic of each of the products under consideration is its inherent fungibility and price sensitivity"); *Certain Carbon Steel Prods. from Argentina, Australia, Finland, South Africa, and Spain*, USITC Pub. 1510, Inv. No. 701–TA–212 and Inv. Nos. 731–TA–169–182, at 8 (Mar. 1984) (prelim.) (noting "apparent fungibility and price sensitivity of these carbon steel products").

facts and circumstances warrant a different conclusion, however the court notes that in making this finding the Commission may not act arbitrarily. *See U.S. Steel Group,* Slip. Op. 94–201, at 50; *Asociacion Colombiana de Exportadores de Flores v. United States,* 12 CIT 1174, 1177, 704 F. Supp. 1068, 1071 (1988); see also Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285–86 (1974) (agency must articulate rational connection between facts found and conclusion reached).

The court disagrees with petitioners' contention that the Commission "completely failed" to provide any reasoned analysis explaining its departure from past practice. During the voting, many Commissioners noted that the steel industry today is much different from ten years ago. Def.'s App., vol. 1, List 1, Doc. 1166, at 9–10, 22–23, 32–33 (Tr. of Proceedings Before U.S. Int'l Trade Comm. (July 27, 1993)). Further, the Commission considered a number of factors to support its findings that the cold-rolled industry was not price sensitive and had limited substitutability. To reach its determination as to limited substitutability, the majority found that (1) purchaser questionnaires showed that quality, not price, was most important in purchasing decisions, (2) certification and pre-qualification requirements limit an end-user's ability to switch between imports and domestic production, (3) the cumulated imports were "much more heavily concentrated" than the domestic industry in specialty (niche) products, and (4) cold-rolled products were almost never sold on speculation or to stock steel service center or end-user inventories. *Final Det.* at 120–22. Thus, the court finds that the majority did not act arbitrarily and articulated a rational connection between its findings and the conclusions reached. The issue now is whether the majority, in conducting its independent evaluation, based its conclusions upon substantial evidence. Each of petitioners' challenges will be addressed in turn.

First, petitioners contest the majority's interpretation of questionnaire responses finding that product quality was more important than price in purchasing decisions. In the final determination, the majority found that 71 responding purchasers listed "product quality" as "critical" to purchasing decisions, compared to 40 purchasers listing "price" as "critical." *Id.* at 122. The court finds no error in the commission's consideration of this data. *See Negev Phosphates, Ltd. v. United States,* 12 CIT 1074, 1092, 699 F. Supp. 938, 953 (1988) (noting that court should not interfere with Commission's discretion to interpret reasonably evidence collected in investigation).

Second, petitioners contest the Commission's finding that certification and pre-qualification requirements[19] limit an end-user's ability to switch between imports and domestic production. In the final determination, the majority supported its conclusions with findings that

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[19] Certification and pre-qualification requirements are employed to enable end-users to ensure that products purchased from suppliers satisfy the internal quality and performance standards needed to produce end products. Pub. Staff Report at I–165.

(1) the requirements involved considerable time and expense to process, taking between six months and two years for major end-users, (2) a significant percentage of purchasers reported that they had not changed suppliers in the last five years, and (3) most purchasers maintained relatively few approved suppliers and generally did not switch suppliers from order to order. *Final Det.* at 121–22 & nn. 301–02.

Petitioners contend that the evidence cited by the majority regarding the certification/qualification process failed to include information on distribution/service centers, and thus is not representative of all purchasers' actual responses. According to petitioners, after inclusion of this data, time and costs associated with the qualification process are not so burdensome for *all* purchasers.[20] Although this may be so, the Commission did not err in focusing its inquiry on information as to end-users. As nearly 73% of all domestic cold-rolled merchant shipments were to end-users, compared to approximately 44% of import shipments, the court does not find the majority's analysis of the qualification process unreasonable. *See* Pub. Staff Rpt. at I–48 tbl. 14.

Third, petitioners challenge the majority's finding that the subject imports were much more heavily concentrated than the domestic industry in specialty (niche) products as opposed to commercial grade products. *Final Det.* at 120–21. In the final determination, the majority determined that the concentration of specialty (niche) products[21] for the cumulated countries ranged from 24.4% to 33.9% (depending on the countries cumulated by each Commissioner), compared to 8.4% in 1992 for the domestic industry.[22] *Id.* at 121 n.298. Petitioners argue that the majority miscalculated the domestic concentration figure by failing to include captively produced ultra-thin steel[23] in the numerator of its calculation, even though the captive production amount was included in the denominator for total production.[24] Once this error is corrected, petitioners contend, 22.8% of the domestic industry is concentrated in specialty (niche) production. Defendant and respondents contend that petitioners are estopped from challenging the Commission's figure because the calculation was made using data reported by petitioners' questionnaire responses.

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[20] Eight of the top 15 distribution/service centers, based on total volume of purchases during the period of investigation, reported certification or pre-qualification requirements. Resp'ts' Joint Mem. P. & A. Opp'n Pet'rs' Mot. J. Agency R. at 76 n.87. The certification or pre-qualification process for this group ranged from one month to three months. *Id.* Petitioners argue that after inclusion of the distribution centers, for the top twenty purchasers the certification or pre-qualification process averaged about two months and the average processing costs were about $4000. *See* Pet'rs' Mot. J. Agency R. at 88 n.202.

[21] The majority examined the following specialty products: cold-rolled motor lamination steel, high carbon steel, ultra-thin steel, and Niche products 31–33, 35–38, 54–62. *Final Det.* at 121 n. 298.

[22] To determine the level of specialty and niche production in the cumulated imports, the majority divided the total production of those products by the total production of the cumulated countries in 1992. For the domestic industry, the majority apparently relied on the Respondents' Cold-Rolled Prehearing Brief as the source for the 8.4% figure. *See Final Det.* at 121 n.298 (citing Cold-Rolled Resp'ts Prehearing Br. at 24–25); *see also* Resp'ts' Apps. Accompanying Mem. P. & A. Opp'n Pet'rs' Mot. J. Agency R., Tab 15, at 25 (Cold-Rolled Resp'ts' Prehearing Br.).

[23] Approximately 93% of all ultra-thin steel production was captively consumed in downstream production of tin plate and tin-free steel. Pub. Staff Rpt. at 1–23 & n.36 (citing American Iron and Steel Institute ("AISI") statistics)

[24] Petitioners also contend that the majority actually overestimated the concentration of cumulated imports in specialty (niche) production. They argue that niche products 59 and 37 are in fact ultra-thin steel and were thus double-counted. Although this may be so, the error would change the majority's calculations by an insignificant percentage (less than 2%).

In the producers' questionnaires, domestic producers were requested to report all production of ultra-thin steel which was defined as "[a]n uncoated cold-rolled carbon steel flat product, such as 'tin mill black plate,' * * * that can be used as the substrate for tinplate (tin-coated steel), tin-free steel * * * or other coated flat products." Resp'ts' Apps. Accompanying Mem. P. & A., Tab 13, at 7 (Sample Producers' Questionnaire). Further, the questionnaires specifically requested that captive transfers of ultra-thin steel be reported.[25] *Id.*, Tab 13, at 4. Most domestic producers, however, failed to report any captive production or shipments of ultra-thin steel.

In fact, the Commission made a special effort to avoid error on this point. In a follow-up letter sent to domestic producers, the Commission specifically requested petitioners to identify whether "the industry report[ed] captively consumed tin mill black plate[26] in the cold-rolled data" because of concerns that producers' reported production could not be reconciled with AISI industry figures that indicated shipments of 3.9 million tons of tin mill black plate and its downstream products. *See* Resp'ts' Post-Oral Argument Subm. (Letter to Michael H. Stein and Robert E. Lighthizer from Lynn Featherstone, List 2, Doc. 301GG (July 1, 1993)). The domestic producers' response was that the producers' questionnaire requested "a separate break-out of 'ultra-thin' cold-rolled products." Def.'s App., vol. 3, List 2, Doc. 199, at 10 n.20 (Pet'rs Posthearing Br., vol. 4, Ex. 2). This contention is erroneous. As indicated, the producers' questionnaires specifically requested that ultra-thin captive production and captive transfers be reported. Furthermore, at no time during the proceedings did petitioners challenge the 8.4% figure, which was originally cited in Respondents' Joint Cold-Rolled Prehearing Brief and later relied upon by the majority. *See supra* note 22. The petitioners cannot now claim that the Commission erroneously failed to rely upon figures that the domestic producers declined to provide, despite two requests from the Commission. Thus the court finds that the Commission properly relied upon the product ion quantity of ultra-thin steel as reported by domestic producers in their questionnaire responses. *See* Conf. Staff Rpt. at C–7 tbl. C–5.[27]

Defendant did admit a relatively minor error in the calculation at oral argument, that is, it erroneously excluded captive transfers reported by USS-POSCO Industries. Correction of this error changes the domestic concentration figure in specialty (niche) products to approximately 10%. Changing the figure from 8.4% to 10%, however, does not undermine the majority's conclusion that cumulated imports were much

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[25] The producers' questionnaire defined "company transfers" as "including 'captive shipments'" and "[s]hipments of products within or between your firm's plants, divisions, and/or related/affiliated companies." Resp'ts' Apps. Accompanying Mem. P. & A., Tab 13, at 4. "Captive shipments" were defined as "[s]teel that is used internally for further processing or transferred to a related/affiliated company for further processing." *Id.*

[26] Ultra-thin steel is also known as tin mill black plate. Pub. Staff Rpt. at 1–23.

[27] Even though this error was petitioners' fault, the court also considered whether this error was so fundamental that justice requires a remand. The court concludes it does not. Imports were still more concentrated in niche categories and even in the merchant market the effects on the domestic industry were attenuated. *See supra* note 14.

more concentrated in specialty (niche) products than domestic production.

Lastly, in the final determination, the majority recognized that the cold-rolled market was primarily based on orders received from service centers or end-users and that products are "almost never sold on speculation or to stock steel service centers or end users inventories." *Final Det.* at 100, 120. Petitioners contend that this finding is evidence that the cold-rolled industry is a "custom market," that is, capable of producing all of the products at issue at the order stage, and thus "foreign and domestic products are *infinitely substitutable.*" Pet'rs' Mot. J. Agency R. at 96. Defendant counters that although domestic products had the "*theoretical* ability" to produce many specialty (niche) products, there was substantial evidence on the record supporting a finding that other factors, such as quality and availability, were important to purchasing decisions and thus the Commission properly concluded that substitutability was limited between domestic products and imports. The court agrees.

In the final determination, the majority noted that "a reliable source of supply with consistent quality is essential to most end users." *Final Det.* at 120. This finding is supported by the majority of purchaser questionnaire responses listing as "critical" and "very important" factors such as product quality, supplier qualification, and current availability of the product, in making purchasing decisions. *See id.* at 122. The majority also cited evidence that some purchasers indicated that domestic producers were "unable to produce certain gauges and widths of cold-rolled products available in the cumulated imports." *Id.* at 125. Finally, the majority noted the fact that the domestic industry failed to report production of many specialty (niche) products imported by the cumulated countries. *Id.* at 126 & n.327. Thus, based upon these and other factors, the majority determined that there existed limited substitutability in the market. The court finds the majority's conclusion to be supported by substantial evidence.

Petitioners also challenge the separate substitutability analyses of Commissioners Brunsdale, Crawford and Watson. With regard to Commissioner Brunsdale, petitioners have not contested any specific findings regarding the substitutability of the cold-rolled industry, but rather contend that her general approach of analysis for substitutability in the various portions of her views is internally inconsistent. The court has found no error in Commissioner Brunsdale's substitutability analysis in these investigations. *U.S. Steel Group,* Slip. Op. 94–201, at 54–55.

Similarly, petitioners challenge Commissioner Crawford's substitutability analysis, with which Commissioner Watson concurred, because of an alleged flawed economic analysis, rather than any specific findings made by the Commissioners for the cold-rolled industry. Petitioners raise the same arguments rejected in *U.S. Steel Group. Id.* at 55–57.

D. *Interim 1993 Data:*

Petitioners allege that the imposition of preliminary duties in December 1992 and February 1993 resulted in increased prices and market share for the domestic industry, thus conclusively showing that unfairly traded imports had a suppressing and depressing effect on domestic prices. In the final determination, the majority did not rely on this interim data reasoning that, as it did not collect any data outside the period of investigation ("POI"), it could not conclude "that the domestic producers' ability to enforce price increases after bond requirements were in place definitely shows there was price suppression or depression during the period examined." *Final Det.* at 129 & n.343. Further, the Commission indicated that other factors may have influenced the domestic industry's recovery, such as improved economic conditions in 1993, and increased demand by large purchasers as evidenced by "increased lead times for receipt of cold-rolled products." *Id.* Finally, because "extensive evidence on the record suggest[ed] that the subject imports did not significantly suppress or depress prices during the period examined," the Commission declined to accept petitioners' assertions. Id. at 129.

The court generally has not required the Commission to rely on interim data because of concerns as to reliability. *See U.S. Steel Group,* Slip. Op. 94–201, at 65; *General Motors Corp. v. United States,* 827 F. Supp. 774, 781 (Ct. Int'l Trade 1993) (noting that Commission, as trier of fact, has discretion to discount unreliable interim data). Thus, the court does not find that the majority erred in failing to rely on the 1993 interim data.[28]

IV. *Threat of Material Injury Analysis:*

A. *Petitioners' Challenges:*

1. Lack of Cumulation

For purposes of threat analysis, the Commission must consider ten enumerated factors, including other economic factors it deems relevant. 19 U.S.C. § 1677(7)(F)(i).[29] In addition, an affirmative threat determination must be based on "evidence that the threat of material injury

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[28] On November 14, 1994, petitioners moved to strike certain statements made during oral argument in this case. The court notes that it did not consider those statements in rendering this opinion. Thus, the motion is moot.

[29] The statute provides that the Commission, in determining whether an industry in the United States is threatened with material injury by reason of imports, shall consider, among other relevant economic factors,

> (I) [i]f a subsidy is involved, such information * * * as to the nature of the subsidy * * *,
> (II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,
> (III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,
> (IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,
> (V) any substantial increase in inventories of the merchandise in the United States,
> (VI) the presence of underutilized capacity for producing the merchandise in the exporting country,
> (VII) any other demonstrable adverse trends that indicate the probability that the importation * * * of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,
> (VII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) * * * or to final orders * * *, are also used to produce the merchandise under investigation,
> * * * * * * *
> (X) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

19 U.S.C. § 1677(7)(F)(i) (footnotes omitted).

is real and that actual injury is imminent." *Id.* § 1677(7)(F)(11). Further, the Commission's determination may not be based on "mere conjecture or supposition." *Id.*

The statute further provides that "[t]o the extent practicable * * * the Commission may cumulatively assess the volume and price effects of imports from two or more countries." *Id.* § 1677(7)(F)(iv) (Supp. V 1993). For its threat analysis, the majority declined to cumulate imports from any of the subject countries stating that the lack of uniformity of pricing trends and varying volume and market penetration trends among the subject countries "render meaningful cumulative analysis difficult." *Final Det.* at 132–33. This court has upheld the Commission's decision not to cumulate imports for threat purposes where significant disparities exist between the subject countries' volume increases or patterns of underselling. *See Torrington Co. v. United States,* 16 CIT 220, 229, 790 F. Supp. 1161, 1172 (1992), *aff'd,* 991 F.2d 809 (Fed. Cir. 1993); *Asociacion Colombiana,* 12 CIT at 1178, 704 F. Supp. at 1072. Also, for those countries not cumulated in its material injury analysis, the Commission found that the same negligibility factors supported its decision not to cumulate for threat. *Final Det.* at 133.

Petitioners contest the majority's decision not to cumulate imports from certain groups of countries. They argue that the similarity of trends between Canada and Korea, and the similarity between Belgium, Brazil, France, Italy and The Netherlands negates the majority's stated rationale that "lack of uniformity of pricing trends" supports its decision not to cumulate imports for purposes of its threat analysis. The Court disagrees.

The statute and case law clearly contemplate that it is within the Commission's discretion to cumulate for purposes of threat analysis. The fact that petitioners are able to assemble certain subgroups of countries whose trends are somewhat similar does not indicate that the Commission abused its discretion in not cumulating imports from these countries. Furthermore, no specific subgrouping of countries was requested by petitioners.

Petitioners challenge specifically Commissioner Nuzum's negative threat determination for Canada. Commissioner Nuzum, in exercising her discretion to cumulate imports for her threat analysis, stated that she generally considered three factors:

> 1) [M]y determinations to cumulate for present injury; 2) the lack of evidence of cumulated adverse volume and price effects for present injury and the extent to which price and volume trends for individual countries suggest any contrary evidence; and 3) the condition of the domestic industries and whether the industries demonstrated any vulnerability to future adverse volume or price effects from imports.

Id. at 385. With regard to Canadian imports, Commissioner Nuzum stated that

> I decline to cumulate the cold-rolled imports from Canada * * * based on the lack of substantial evidence of similar adverse price effects. While imports from Canada showed significant margins of underselling for one product, the volumes upon which these margins were based were extremely small. Price trends for the Canadian products based on more substantial volumes showed consistent overselling.

Id. at 386.

Petitioners contend that the record clearly contradicts Commissioner Nuzum's finding that the volumes of underselling imports were "extremely small." Petitioners argue that the actual volumes of underselling imports represented a very significant percentage of total imports. Defendant and respondents counter that the volume figures petitioners cite are actually based on incorrect data in the Staff Report. The incorrect data, defendant contends, were submitted by a single importer who erroneously reported import volumes for two products. Conf. Staff Rpt. at N–60 tbl. N–60, N–62 tbl. N–62. The correct figures, according to defendant, support Commissioner Nuzum's conclusion that the volumes for underselling imports were in fact small.

In its questionnaire response, the importer erroneously reported shipments for two products in thousands of short tons. Def.'s App., vol 3, List 2, Doc. 301.334, at Ex. D, Prod. 9, 11 (purchaser's questionnaire response). In the same questionnaire response, the importer's reported total domestic imports from Canada were far below the import volumes it reported for the two products. *Id.*, List 2, Doc. 301.334, at 14. Further, the volumes of the two imported products even exceeded the total reported imports for *all* cold-rolled steel from Canada. *Compare id.*, List 2, Doc. 301.334, at Ex. D, Prod. 9, 11 *with* Pub. Staff Rpt. at I–137 tbl. 95. Thus, the importer's figures were incorrect. Of the Commissioners in the majority, only Commissioner Rohr mentioned the erroneous volume of underselling imports. *Final Det.* at 156. Nonetheless, contrary to petitioners' contention, the court agrees with defendant that the importer erroneously reported the import volume amounts and that Commissioner Nuzum did not rely upon the incorrect volume figures. As a whole, the majority seems to have correctly perceived the volume of underselling or did not rely on the erroneous information.

2. Product shifting for Canada, France and Japan

Petitioners argue that the majority failed to adequately consider the statutory factor of product shifting in its negative threat determinations for Canada, France and Japan. For each of these countries, the majority considered product shifting a "theoretical possibility" given each country's affirmative material injury determinations for corrosion-resistant products. *Final Det.* at 142, 144, 147. Considering various factors, the majority stated, for each country, that the theoretical possibility to product shift was not a significant enough threat to support an affirmative threat determination. *Id.* at 142–44, 147. Among the reasons cited by the majority were that (1) substantial investment was nor-

mally made in corrosion-resistant steel production, (2) there existed a large incentive to produce higher value-added products to recoup investments in downstream production facilities and (3) facilities for producing corrosion-resistant products normally involved separate coating lines. *Id.* at 143–44, 147.

Petitioners assert that (1) as much of the production is integrated for these countries, no additional capital expenditures are necessary to shift production, (2) the imposition of prohibitive duties creates the incentive to product shift, and (3) the incentive to product shift was intensified by weak home market and third country demand. Further, petitioners argue that the financial structure of the integrated firms provides incentive to maintain capacity utilization at the "hot end" of production (semi-finished hot-rolled steel used for substrate).

The court does not find that the Commission's conclusion finding product shifting unlikely is unsupported by substantial evidence. The Commission, though finding a theoretical possibility of product shifting, properly considered evidence discounting the likelihood that substantial product shifting would occur. *See U.S. Steel Group,* Slip. Op. 94–201, at 66–69 (sustaining Commission's consideration of product shifting from corrosion-resistant products in the hot-rolled investigation).

B. *Respondents' Challenges:*

1. Korea

a. Commissioner Rohr's determination

Dongbu challenges the affirmative threat determination made by Commissioner Rohr, contending that his findings are not supported by substantial evidence on the record. Specifically, Dongbu contests Commissioner Rohr's finding that imports from Korea are likely to enter the domestic market imminently at prices that will have a suppressing or depressing effect on domestic prices. In his examination of pricing comparisons for threat analysis, Commissioner Rohr found "considerable underselling" by Korean imports. *Final Det.* at 157. Dongbu argues that this is inconsistent with his conclusion that Korean imports "over[sold] the domestic products in more than half of the Commission's pricing comparisons." *Id.* at 154 (discussing negligibility).

Although Korean imports oversold domestic products in a majority of instances (approximately 60%), the two characterizations by Commissioner Rohr are not incompatible because the instances of underselling, while less than a majority, were not insignificant. Contrary to Dongbu's contention the court does not find that Commissioner Rohr relied "exclusively" on the underselling and overselling data to support a finding of threat for Korea. Commissioner Rohr, rather, relied on several factors including the fact that Korean imports increased by quantity and by value during the POI to a 0.6% market share in 1992. *Id.* at 157; Pub. Staff Rpt. at I–147 tbl. 105. Commissioner Rohr also relied on Korea's steadily declining average import prices to support his finding that

Korean imports will likely have a suppressing or depressing effect on domestic prices. *See id.* at 157; Pub. Staff Rpt. at I–137–I–138 tbl. 95.

Dongbu further contends that Commissioner Rohr's failure to find a "rapid" increase and the generally low market share for Korean imports do not support a finding of threat. The court has recognized, however, that even though an increase in imports is not found to be "rapid," the increase may still be considered a demonstrable adverse trend supporting an affirmative threat determination. *Metallverken Nederland B.V. v. United States,* 13 CIT 1013, 1029–30, 728 F. Supp. 730, 742–43 (1989); *see* 19 U.S.C. § 1677(7)(F)(i)(VII).

Finally, Dongbu challenges Commissioner Rohr's reliance on production capacity and capacity utilization figures to support a finding that exports to the United States would significantly increase. In conducting a threat analysis, the statute provides that the Commission must consider "any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States." 19 U.S.C. § 1677(7)(F)(i)(II). Commissioner Rohr found that in light of substantially increased productive capacity (projected to increase sharply in 1993), steadily declining capacity utilization rates, and declining home market demand, Korean shipments were likely to increase in favor of "exports to all regions including the U.S. market." *Final Det.* at 156–57. Although, as acknowledged by Commissioner Rohr, the significance of the U.S. market to Korea declined slightly, *id.* at 156 & n.21, the court does not find the Commission's conclusion unsupported.

Commissioner Rohr also noted other factors, that Dongbu does not specifically contest, to support his affirmative threat finding. The Commissioner found that the levels of inventories for Korea posed "a threat of additional dumped exports on the U.S. market." *Id.* at 157. Further, Commissioner Rohr noted that the possibility of some product shifting existed given the affirmative material injury determination for corrosion-resistant production. *Id.* Commissioner Rohr stated, however, that he "[did] not place great weight on this factor." *Id.* at 158. Finally, because the Commissioner informally cumulated Canada, Germany and The Netherlands[30] with Korea for purposes of his threat analysis, he considered the presence of unfairly traded imports from these countries "as another demonstrable adverse trend that would suggest a threat of material injury."[31] *Id.* at 156, 158. Based on the record taken as a whole, the court finds Commissioner Rohr affirmative threat determination for Korea to be supported by substantial evidence. *See Torrington,*
16 CIT at 226, 790 F. Supp. at 1170 (noting that Commission has discretion to determine relevance and significance of factors considered).

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[30] In 1992 these three countries accounted for a 2.6% share of apparent domestic consumption (by volume) with a total import volume of 746,947 short tons. Pub. Staff Rpt. at I–137 tbl. 95, I–147 tbl. 105.

[31] Informal cumulation is a joint consideration of imports from various countries, which may have simultaneous impact, but only the subject country's imports will be found injurious. That is, a separate formal threat analysis is undertaken for each subject country, and that analysis may include a subsidiary joint analysis.

b. Commissioner Newquist's determination

Dongbu also challenges the affirmative threat determination made by Commissioner Newquist, contending that his findings are not supported by substantial evidence on the record. In conducting his threat analysis, Commissioner Newquist formally cumulated imports from Belgium, Brazil, Canada, France, Germany, Japan, Korea and The Netherlands. *Final Det.* at 300. Thus, Commissioner Newquist's analysis addressed the enumerated statutory threat factors with regard to the aggregate trends and imports of the cumulated countries. In addition to the enumerated threat factors, the Commissioner examined the domestic industry's access to capital markets based on industry and market perceptions of the presence of unfairly traded imports.[32] *Id.* at 294–97. Commissioner Newquist viewed such an analysis as "entirely consistent with the type of imminent injury anticipated by the threat rationale, particularly as it relates to the actual and potential negative effects on the industry's development and production efforts."[33] *Id.* at 297.

Based on his analysis, Commissioner Newquist determined that the cumulated countries' imports warranted an affirmative threat determination. The Commissioner found that increased volume and market share, the large volume of divertible exports, the significant presence of subsidies for many countries, large unused capacity, and the adverse effect on the domestic industry's ability to raise capital, supported his findings for threat. *Id.* at 300–02.

Dongbu contends that Commissioner Newquist relied heavily on his "access to capital markets" analysis to the exclusion of the other statutory factors, and that the conclusions reached by the Commissioner were highly speculative. As Dongbu admits, the Commissioner was not precluded from analyzing the impact of the cumulated imports on the domestic industry's access to the capital markets, as it is within his discretion to consider other relevant economic factors in addition to those specifically enumerated in the statute. 19 U.S.C. § 1677(7)(F)(i). The statute further provides, however, that an affirmative threat determination may not be based on "mere conjecture or supposition." *Id.* § 1677(7)(F)(ii).

Dongbu maintains that much of the evidence relied upon by Commissioner Newquist consisted of speculative, self-serving testimony. In support of his analysis, specifically his capital market analysis, Commissioner Newquist relied upon petitioners' questionnaire responses, testimony from two chief executive officers and a president of three petitioning companies, as well as four sworn affidavits from steel analysts and a managing director of leading U.S. investment banking firms.

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[32] For example, commissioner Newquist relied on testimony indicating that "without the imposition of antidumping and countervailing duties, access to capital will be even more restricted, and the limited available capital even more costly." *Final Det.* at 297.

[33] Contrary to Dongbu's contention, the court does not find that Commissioner Newquist conducted an expanded cross-industry analysis in his "access to capital markets" discussion. It is clear from the separate industry determinations that a separate finding was made with regard to each industry's ability to raise capital. *Final Det.* at 299–306. Specifically, for the cold-rolled industry, commissioner Newquist found marked declines in capital expenditures during the POI, thus supporting his conclusion that the "[capital] markets * * * restricted capital access." *Id.* at 301–02.

Final Det. at 294–97. This court has recognized, however, that "assessments of the credibility of witnesses are within the province of the trier of fact. This [c]ourt lacks authority to interfere with the Commission's discretion as trier of fact to interpret reasonably evidence collected in the investigation." *Negev Phosphates,* 12 CIT at 1092, 699 F. Supp. at 953 (citations omitted). Furthermore, the court does not find Commissioner Newquist's reliance on the largely uncontradicted testimony unreasonable. Dongbu's other challenges to Commissioner Newquist's analysis generally would require the court to address the appropriate weight to be afforded to the evidence. This court may not reweigh evidence relied upon by the Commission, rather it is the Commission that "must assess the quality of the evidence and give such weight to the evidence as it believes is justified." *Iwatsu Elec. Co. v. United States,* 15 CIT 44, 47, 758 F. Supp. 1506, 1509 (1991). The court finds Commissioner Newquist's reliance on the capital markets analysis to be supported by the record and not based on mere conjecture or supposition.[34]

Dongbu further claims that the other factors relied upon by Commissioner Newquist are unsupported by substantial evidence. Dongbu argues that three factors Commissioner Newquist relied upon to support his threat determination were heavily tied to his capital markets argument. As the court does not find Commissioner Newquist's capital markets analysis to be unreasonable, Dongbu's contentions that these factors are unsupported based on the "inherently flawed capital markets theory" is without merit.

The court finds no error with Commissioner Newquist's findings as to production and unused capacity, market penetration, and price suppression and depression. commissioner Newquist properly considered substantial unused capacity among the cumulated countries. Although he did not state specifically that such unused capacity would lead to a "significant increase in imports," *see* 19 U.S.C. § 1677(F)(i)(II), the Commissioner apparently included this factor in reaching his threat determination. *See Negev Phosphates,* 12 CIT at 1083, 699 F. Supp. at 947 (upholding commission finding, although it did not explicitly declare that volume of imports was significant, as agency's path was reasonably discernible). The explanations of the other Commissioners in the majority are more clear on this point and Commissioner Newquist's statements are not inconsistent with such views.[35]

The Commissioner also found that because of substantial shipments to non-U.S. markets, there was at least a potential for significant production to be shifted from other markets to the United States. *Final Det.* at 301. Evidence of imminency of such a shift was not well explained, but

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[34] Dongbu also contests Commissioner Newquist's reference to the industry's plummeting stocks following the Commission's determinations as validation of the correctness of the capital markets' perceptions. *Final Det.* at 297. Although Commissioner Newquist's reference to events occurring outside the POI may have caused needless confusion, the reference was made after the formal vote. Thus, the court does not find the reference sufficiently adverse to warrant remand.

[35] The court is aware of the somewhat different country mixes considered by the Commissioners in the majority, but finds such differences unimportant for this particular explanation, as Commissioner Newquist cumulated to the greatest extent.

potential for shifting was but one of a number of factors considered. Furthermore, contrary to Dongbu's contention, the Commissioner need not find that market penetration increased rapidly. *See* discussion, *supra*, at p. 43. Dongbu alleges no error in Commissioner Newquist's finding as to price suppression or depression, but only asks the court to reweigh the significance of the evidence on the record, which the court declines to do. *See Iwatsu Elec.*, 15 CIT at 47, 758 F. Supp. at 1509.

Dongbu finally contends that Commissioner Newquist abused his discretion in cumulating Korea for purposes of threat because significant disparate trends existed between Korean imports and the other cumulated countries. Specifically, Korea argues that its 0.6% share of apparent domestic consumption, a majority of instances of overselling, and significant capacity utilization rates differ significantly from the other cumulated countries, and thus Korean imports warrant non-cumulation.

In making his cumulation determinations, Commissioner Newquist considered two factors:

> (i) whether there is competition between the subject imports themselves and the domestic like products; and (ii) whether the subject imports from each country are 'negligible.'

Final Det. at 260. With regard to Korea, the Commissioner found that there existed a reasonable overlap of competition between Korean imports and domestic products. *Id.* at 274. He further found Korean imports not negligible based on his findings that import volumes increased, Korea's share of apparent domestic consumption accounted for 0.6%, and mixed underselling and overselling data indicated "some degree of discernible adverse impact." *Id.* at 275. Dongbu does not contest these specific findings.

The court disagrees with Dongbu's contention that Commissioner Newquist must "address the critical threshold question of the existence of disparate trends in the data." Dongbu's Mem. P. & A. Supp. Mot. J. Agency R. at 62. Although disparate trends may form the basis for not cumulating imports for threat purposes, the court will not interfere with a reasonable exercise of the Commission's discretion to cumulate. For purposes of his threat analysis, Commissioner Newquist cumulated imports to the extent that reasonable overlap of competition existed and the evidence warranted a non-negligibility finding. The statute favors maximum cumulation, but recognizes the difficulties Commissioners may face in applying their particular modes of threat analysis in a cumulative framework. *See* H.R. Rep. No. 40, 100th Cong., 1st Sess., pt. 1, at 131 (1987) (indicating that, in requiring cumulation to extent practicable, Congressional intent is that Commission apply same principles regarding cumulation for threat as it would apply for material injury). Commissioners must exercise discretion as to cumulation for threat in the context of a variety of fact patterns. Commissioner Newquist's mode of analysis as applied to these facts is compatible with the statutorily-sanctioned broad approach to cumulation, that is, it is not unreasonable

to find cumulation practicable here. Under these circumstances, the court finds that Commissioner Newquist reasonably exercised his discretion to cumulate Korean imports and, based on the record as a whole, that his decision is supported by substantial evidence.

c. Commissioner Nuzum's determination

Dongbu challenges Commissioner Nuzum's affirmative threat finding for Korea, contending that her findings are also not supported by substantial evidence on the record. For purposes of her threat analysis, the Commissioner cumulated Belgium, Brazil, France, Germany, Italy, Korea, The Netherlands and Spain. *Final Det.* at 386. The Commissioner found a "preponderance of underselling" among the cumulated imports. *Id.* at 388. Dongbu contends that the record contradicts this finding, arguing that the ratio of underselling (55%) to overselling (45%) "is, at worst, 'mixed.'" Dongbu's Mem. P. & A. Supp. Mot. J. Agency R. at 66. With regard to Korea, Commissioner Nuzum specifically noted the majority of overselling, however, she nevertheless found the underselling data to be significant. *Final Det.* at 386. Commissioner Nuzum further found that average import prices for the cumulated imports "declined more steeply than prices of domestic products" and were "closely tracking domestic prices." *Id.* at 386, 388. Although the pricing comparisons could possibly be characterized as "mixed," the court finds that the totality of evidence supports Commissioner Nuzum's finding of price suppression and depression by reason of the cumulated imports.

Dongbu also challenges Commissioner Nuzum's finding that significant unused or underutilized capacity will lead to increased imports to the U.S. market. *Id.* at 387. The Commissioner relied upon the fact that unused capacity exceeded 6 million tons for the cumulated countries, compared to the approximately 1 million tons of export shipments to the United States. *Id.* Given the rapid increase in export volumes to the United States for the cumulated countries near the end of the POI, *id.*, the court finds it reasonable for Commissioner Nuzum to infer that a substantial portion of future increased capacity would be devoted to export shipments to the United States.

In addition, Commissioner Nuzum found (1) with the exception of France, increased import volumes for each of the cumulated countries in 1992, (2) increased market share for the cumulated imports, accounting for 4.4% in 1992, (3) the existence of subsidies, substantial in some cases, for all the cumulated countries except one, and (4) the possibility of negative effects on existing development and production efforts. *Id.* at 386–88. Contrary to Dongbu's contentions, the court does not view these findings as inconsistent with Commissioner Nuzum's material injury findings.

Lastly, Dongbu argues that Commissioner Nuzum improperly cumulated Korean imports with the other subject imports. As indicated with regard to the discussion of Canadian imports, for purposes of her threat analysis, Commissioner Nuzum generally considers three factors. *See*

discussion, *supra*, at p. 38; *Final Det.* at 385. Dongbu contends that the Commissioner should not have ascribed the divergent trends from the cumulated countries to Korea, whose trends were disparate from the others. Underlying Dongbu's arguments are its contentions that (1) Korean products oversold domestic products in a majority of instances, and (2) Korea's capacity utilization figures were significantly higher than the other cumulated countries.

Although Commissioner Nuzum noted that no individual country exhibited significant adverse volume effects during the POI, she did note that many of the cumulated countries showed a majority of underselling instances. *Final Det.* at 385–86. The Commissioner also found that "price trends for these same countries—and Belgium, France and Korea—showed marked declines from 1990 to 1992." *Id.* at 3P6. Even though Korea did not exhibit a majority of instances of underselling, and assuming *arguendo* that disparate trends may require non-cumulation in some circumstances, the court does not find sufficient disparateness to require non-cumulation. As the court noted previously, Commissioner Nuzum reasonably considered Korea's underselling to be significant. Further, the Commissioner reasonably concluded that Korea's declining price trends, along with the other cumulated countries, weighed in favor of cumulation. Dongbu does not contest the finding of declining price trends.

Dongbu also contends that Commissioner Nuzum erred in cumulating Korean imports because Korea's capacity utilization figure was significantly higher in 1992 than that of the cumulated countries, which she found to have "significant unused/underutilized capacity." *Id.* at 387. The court does not find this argument compelling. As indicated, the Commissioner found declining price trends to weigh heavily in her decision to cumulate the subject countries. Commissioner Nuzum weighed a variety of conflicting factors and arrived at a reasonable decision to cumulate. Based on the evidence taken as a whole, the court finds Commissioner Nuzum's affirmative threat finding with regard to the cumulated imports to be supported by substantial evidence.

2. The Netherlands

a. Adequacy of the investigation

Hoogovens contests the Commission's affirmative threat determination for The Netherlands as not supported by substantial evidence on the record. As a threshold matter, Hoogovens challenges the Commission's investigation of pricing data with respect to The Netherlands. Because the pricing data collected by the Commission represented a very small percentage of total Dutch imports, Hoogovens asserts that the Commission's finding that "most imports from The Netherlands undersold domestic products" is unsupported by substantial evidence. *Final Det.* at 116. Defendant counters that because Hoogovens had full knowledge of the inadequacy of the pricing data with respect to Dutch products early in the proceedings, yet failed to raise the issue until its prehearing brief, it is estopped from making this argument.

On December 11, 1992, the Commission distributed draft questionnaires to petitioners and respondents requesting pricing data for four cold-rolled products. Respondents filed comments on January 21, 1993, requesting that two products be retained, the other two eliminated, and that three additional products and eleven specialty (niche) products be added. The Commission added two of the three additional products, eliminated one of the two products that respondents asked to be eliminated, and added other specialty (niche) products in addition to the eleven that respondents requested. Respondents also requested that the Commission add and/or substitute other products for the pricing comparisons. The Commission declined to add any products, but it did substitute one product requested by respondents. E-mail to Joseph Baremore from Jonathan Seiger, List 2, Doc. 301P (Feb. 3, 1993) (regarding pricing comparisons). The Commission subsequently issued the revised questionnaires requesting pricing data based on a selection of five cold-rolled products,[36] *see* Pub. Staff. Rpt. at I–169–I–170, as well as unit value and quantity data for 19 cold-rolled specialty (niche) products. *See id.* at F–6–F–7, F–8–F–9. Hoogovens, who produced only some of the five cold-rolled products, returned its questionnaire in a timely fashion. *See* Hoogovens' Mem. P. & A. Supp. Mot. J. Agency R. at 26–27.

On March 25, 1993, Hoogovens requested that the definition for a particular specialty (niche) product be revised. The Commission agreed and issued supplemental questionnaires on April 8, 1993, requesting additional information on certain specialty (niche) products. Following additional revision requests by respondents on May 3, 1993, the Commission issued another set of supplemental questionnaires shortly thereafter. Hoogovens filed a prehearing brief on June 18, 1993, raising, for the first time, the inadequate sample size of Dutch imports collected for pricing comparisons. Hoogovens does not contest the accuracy of the pricing data, only the representativeness of the data. Hoogovens' Mem. P. & A. Supp. Mot. J. Agency R. at 20.

Hoogovens should have been aware as early as February 1993, when the Commission issued its initial questionnaire, that the products selected for pricing comparisons were a very small sample of its total imports. Thus, Hoogovens undoubtedly had ample opportunity to inform the Commission of this fact. Hoogovens failed to do this until after all questionnaires were distributed, even though two sets of supplemental questionnaires were issued by the Commission to rectify other deficiencies.

As to core issues, however, the fact that Hoogovens failed to make a "specific and seasonable request is not dispositive." *General Motors,* 827 F. Supp. at 781. As the court noted, the Commission bears the burden to collect all data necessary to its investigation. *Id.* Thus, the court does not find that Hoogovens' failure to notify the Commission of the scant

[36] The Commission indicated that the products were selected in order to "represent items with the largest volumes of domestic and subject foreign producers' U.S. shipments, and which most accurately represent competitive conditions between domestic and subject foreign products in the U.S. market." Pub. Staff Rpt. at 1–168 n.219.

data collected for The Netherlands completely relieves the Commission of its burden.[37]

The court turns to the adequacy of the Commission's investigation. Based on the pricing data collected for The Netherlands, the Commission found that in 22 out of 27 instances, Dutch imports undersold domestic products. *Final Det.* at 159. As indicated, Hoogovens does not contest the accuracy of this data. Furthermore, the only data Hoogovens submitted, to support its claim that the pricing data, though accurate, was unrepresentative of its total imports, were the generalized affidavits by the company presidents of two of Hoogovens' major purchasers. These affidavits indicated that Hoogovens' products were purchased at a price premium. Hoogovens' Conf. App. to Mem. P. & A. Supp. Mot. J. Agency R., Tab 4, Ex. 12 at 2, Ex. 15 at 3 (Exs. to Hoogovens' Prehearing Br.). While those statements could be viewed as applicable to at least one-half of Hoogovens' U.S. sales, no specific information was submitted, such as invoices, volume data, quarterly price data, unit value figures, point of purchase comparisons, or even dates when the premiums were alleged to have been paid. In the final determination, the Commission dismissed Hoogovens' arguments that "the majority of its products [did] not compete because they sell at a price premium," relying instead on the pricing data as collected. *See Final Det.* at 116. Further, pricing data collected during the preliminary investigation, based on a wider sample of Hoogovens' imports, indicated similar patterns of underselling, with Dutch imports underselling domestic products in 36 out of 45 pricing comparisons.[38] *See* Def.'s App., vol. 2, List 2, Doc. 73, at I–284–1–288 tbls. 120–25 (Conf. Prelim. Staff Report).

The court notes that "Congress set no minimum standard by which to measure the thoroughness of a Commission investigation." *Granges Metallverken AB v. United States,* 13 CIT 471, 481, 716 F. Supp. 17, 25 (1989) (finding that Commission conducted thorough investigation even though Commission collected pricing data for Swedish brass producers covering only eight out of possible 126 quarters). A presumption of correctness, however, is assigned to Commission determinations, thus the party challenging the determination must show that it is unsupported by the record or not in accordance with law. *See* 28 U.S.C. § 2639(a)(1) (1988); *Hannibal Indus., Inc. v. United States,* 13 CIT 202, 209, 710 F. Supp. 332, 337 (1989).

In the present case, Hoogovens has not demonstrated that the pricing data collected by the Commission, even though based on a small sample size, was in fact unrepresentative of total Dutch imports. The affidavits submitted by Hoogovens were of uncertain probative value and lacked much of the specific information the Commission uses in conducting pricing comparisons. Given the inadequacy of the information sub-

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[37] The court does believe, however, that it should keep this background matter in mind, so that the test for adequacy may be somewhat less stringent in such circumstances.

[38] Included in this preliminary data were the imports of full-hard cold-rolled steel products that Hoogovens now seeks to have remain in the pricing data in the final determination. *See* Hoogovens' Reply Br. at 29–30 & n.26, 37. Due to the narrowing of the product definitions in the drafting of the questionnaires, full-hard imports were excluded.

mitted by Hoogovens, the preliminary pricing data and Hoogovens' role in contributing to the small sample size, the court finds that the Commission could reasonably conclude that further investigation was not required. *See Granges Metallverken,* 13 CIT at 481, 716 F. Supp. at 25 (noting that Commission has broad discretion to pursue investigation in manner that will provide substantial evidence for its determinations). The issue now is whether the individual Commissioners' determinations based on the evidence, taken as a whole, are supported by substantial evidence.

b. Commissioner Newquist's determination

Hoogovens challenges Commissioner Newquist's affirmative threat finding for The Netherlands, contending that his findings are not supported by substantial evidence on the record. Hoogovens contests Commissioner Newquist's finding of non-negligibility for The Netherlands. As indicated, in making his cumulation determination for purposes of threat, Commissioner Newquist considers the extent that reasonable overlap of competition exists between the imports and domestic products, and whether the imports were negligible. *Final Det.* at 260. With regard to the pricing data for The Netherlands, the Commissioner stated that "evidence of mixed under and overselling indicates some level of discernible adverse impact on the domestic industry." *Id.* at 275.

The Commissioner also relied upon findings that (1) there existed reasonable overlap of competition between Dutch imports, other subject imports, and domestic products, (2) import volumes increased, although irregularly, during the POI, (3) as a share of domestic consumption by quantity and value, Dutch imports never fell below 0.5% during the period examined, and accounted for 0.6% in 1992, and (4) Dutch sales were neither sporadic nor isolated. *Id.* Contrary to Hoogovens' contention, the court finds that this evidence, taken as a whole, could reasonably support a non-negligibility finding for The Netherlands.

Hoogovens also challenges Commissioner Newquist's use of an average non-weighted unit value ("AUV") for the cumulated countries in his threat analysis. The Commissioner found that because of the greater decline in the AUV for the cumulated imports, as compared to the decline of the domestic AUV, imports likely would lead to suppression or depression of domestic prices. *Id.* at 301. Hoogovens argues that use of the AUV was unreasonable because (1) it was unrepresentative of the imports' product mix, (2) the AUV was not weighted to reflect volumes, and (3) the use of a single AUV for all of the cumulated countries obscured actual pricing trends. Defendant and petitioners counter that past practice and case law support use of AUVs.

Although courts have recognized that the use of AUVs in price comparisons can support Commission findings, none of the cases defendant and petitioners cite specifically support use of a single AUV for a wide variety of products from a significant number of countries. *See, e.g., Maverick Tube Corp. v. United States,* 12 CIT 444, 453–54, 687 F. Supp. 1569, 1578–79 (1988); *Philipp Bros., Inc. v. United States,* 10 CIT 485,

489, 640 F. Supp. 1340, 1344 (1986). Generally, the use of AUVs has not been so broad and expansive as used by Commissioner Newquist in the present case. *See, e.g., Stainless Steel Flanges from India and Taiwan*, USITC Pub. 2724, Inv. Nos. 731–TA–639 and 640, at I–19 (Feb. 1994) (final). Thus, other evidence supporting the Commissioner's conclusion is required.

The Commission noted that Hoogovens "admitted that a substantial percentage of its imports were of generic cold-rolled steel that competed with the domestic like products." *Final Det.* at 115. As the questionnaire data sought pricing data for commodity grade products, the court does not find that, on a country-specific basis, the product mix of Dutch imports was obscured. Further, average import prices from The Netherlands, on a country-specific basis, declined at a faster rate than domestic products. *Compare* Pub. Staff Rpt. at I–138 tbl. 95 *with id.* at I–55 tbl. 16. Thus, the use of a single AUV for price comparisons was not likely to have been prejudicial as to The Netherlands.

Hoogovens makes no specific challenges to Commissioner Newquist's findings with regard to any other threat factors for the cumulated countries. The court concludes that based on the record taken as a whole, Commissioner Newquist's affirmative threat determination for The Netherlands is supported by substantial evidence.

c. Commissioner Rohr's determination

Hoogovens challenges commissioner Rohr's finding of affirmative threat for The Netherlands. Hoogovens contests the Commissioner's finding that the evidence indicated The Netherlands shifted exports away from third-market countries to the United States. *Final Det.* at 158. In support of his conclusion, Commissioner Rohr found that, as a share of total shipments, exports to third-market countries declined during the POI, while exports to the United States increased by quantity and as a share of total Dutch shipments. *Id.* Further, the Commissioner's finding that home market shipments accounted for a relatively low share of total shipments was not unreasonable as the share was lower than that of most of the subject countries. *See, e.g.*, Conf. Staff Rpt. at I–140 tbl. 49; Pub. Staff Rpt. at I–112 tbl. 70. Commissioner Rohr also noted that projected increasing inventories in 1993 posed a threat in light of the increasing exports to the United States and declining Dutch import prices. *Final Det.* at 159. From this evidence, Commissioner Rohr could reasonably conclude that exports were being and would continue to be diverted to the U.S. market.

Commissioner Rohr further found that The Netherlands' market penetration levels increased during the period examined to reach 0.6% in 1992. *Id.* at 158. He also based his determination in part on Dutch pricing data, noting that it showed declining AUVs for Dutch imports compared to domestic AUVs and underselling "in 22 out of 27 quarterly pricing comparisons." *Id.* at 159. As indicated, reliance on the pricing data was not improper. *See* discussion, *supra*, at pp. 55–60. These findings supported his conclusion that Dutch imports are likely to enter the

United States at prices that will have a suppressing or depressing effect on U.S. prices. Additionally, the Commissioner also noted that as he informally cumulated Canada, Germany and The Netherlands for purposes of his threat analysis, *see* discussion, *supra,* at p. 44, he considered the presence of unfairly traded imports from these countries "as another demonstrable adverse trend that would suggest a threat of material injury." *Final Det.* at 156. Finally, the court does not find Commissioner Rohr's findings inconsistent with his material injury findings. Based on the evidence on the record taken as a whole, the court finds Commissioner Rohr's affirmative threat finding for The Netherlands to be supported by substantial evidence.

d. Commissioner Nuzum's determination

Lastly, Hoogovens challenges Commissioner Nuzum's affirmative threat determination. As indicated, Commissioner Nuzum, in exercising her discretion to cumulate imports, generally considers three factors, one of which is her present injury cumulation finding. *Id.* at 385. Hoogovens argues that Commissioner Nuzum's evaluation of "whether [imports] *discernibly contribute* to the adverse impact that the other, cumulated imports are having on the domestic industry" in her present injury cumulation and negligibility analysis is contrary to law. *See id.* at 357.

Commissioner Nuzum engaged in a cumulated analysis of volume and price effects for present injury purposes for most countries involved in the investigation of the four separate like products alleged by petitioners. *Id.* at 360–37 She takes a narrow view of negligibility. Hoogovens' complaint is that Commissioner Nuzum is failing to apply the statute properly because, for purposes of negligibility, she does not look at countries individually.

The court finds that Commissioner Nuzum does indeed do a particularized analysis, but in exercising her discretion not to find negligibility where to do so would do violence to the principle of cumulation, she applies an additional test. In that test she determines whether, when combined with other imports, the imports at issue discernibly contribute to an adverse impact. This appears to the court to fall within her discretion to cumulate. Particularly in a case such as this, where all foreign countries have small shares of the U.S. market, and no country's imports are truly dwarfed by another's, *see* Pub. Staff Rpt. at I–147 tbl. 105, exercising one's discretion not to find imports negligible is not likely to be an abuse of such discretion. *See also* discussion of statutory approval of maximum cumulation practicable, *supra,* at pp. 49–51.

Hoogovens also contests Commissioner Nuzum's decision to cumulate imports from The Netherlands for purposes of her threat analysis based on pricing trends. Significant in Commissioner Nuzum's decision to cumulate cold-rolled imports from the cumulated countries, including The Netherlands, was her finding that most of the countries had significant underselling and declining price trends. *Final Det.* at 386. As the court does not find the pricing data for Dutch imports deficient, *see*

discussion, *supra*, at pp. 57–60, and Hoogovens does not challenge other factual findings, based on the evidence on the record taken as a whole, the court finds Commissioner Nuzum's affirmative threat finding for The Netherlands to be supported by substantial evidence.

3. Germany

a. Determinations by Commissioners Watson and Rohr

Thyssen contends that the affirmative threat determinations of Commissioner Watson and Commissioner Rohr are not supported by substantial evidence. Specifically, Thyssen challenges the Commissioners' threat findings as to capacity utilization, market penetration, price effects, inventory levels, product shifting, and the effects on existing development and production efforts of the domestic industry. The court will address each challenge in turn.

Thyssen argues that the Commissioners mischaracterized Germany's capacity utilization rates during the period of investigation as "relatively low." *Final Det.* at 133; *see* Pub. Staff Rpt. at I–112 tbl. 70. Thyssen argues that this is inconsistent with Commissioner Watson's finding that Canada's projected 1993 capacity utilization rate was very high. *See Final Det.* at 141. The court disagrees. The Commissioners' characterization of Germany's capacity utilization rates as "relatively low," *during the period of investigation,* is not unsupported. Germany's rates during the period examined, which ranged from 74.4% to 77.8%, were low and steady. Pub. Staff Rpt. at I–112 tbl. 70. In fact, the court might call them very low for this industry. Further, Commissioner Watson's reference was to Canada's 1993 projected capacity utilization rate, which was at odds with the actual rates during the period of investigation. *See* Conf. Staff Rpt. at I–163 tbl. 61. Thus, the court does not find Commissioner Watson's analysis to be internally inconsistent.

Thyssen also asserts that the evidence cited by the Commissioners does not support a finding that German imports were likely to increase to injurious levels. Thyssen argues that the "mere presence" of unused capacity cannot support the Commissioners' affirmative threat finding in the absence of "'positive evidence tending to show an intention to increase the level[s] of importation.'" Thyssen's Br. at 16 (quoting *American Spring Wire Corp. v. United States,* 8 CIT 20, 28, 590 F. Supp. 1273, 1280 (1984), *aff'd sub nom. Armco, Inc. v. United States,* 760 F.2d 249 (Fed. Cir. 1985)). Although this may be so, evidence does exist to support the Commissioners' finding in this regard and the determination as a whole. The Commissioners found that during the period of investigation Germany shifted exports from the home market and third-country markets to the United States. *Final Det.* at 134. In support of its conclusion, the Commissioners cited evidence that home market shipments declined due to weak and falling home market demand. *Id.* The Commission noted that as a share of German production, shipments to third country markets declined while exports to the United States increased. *Id.* Further, market penetration by German imports, by quantity, increased to 1.2% in 1992. Pub. Staff Rpt. at I–147 tbl. 105. Taken

together, evidence of low capacity utilization, evidence of increase in U.S. exports and market share, and declining home market demand are supportive of a threat finding. *See Metallverken Nederland B.V. v. United States,* 14 CIT 481, 485, 744 F. Supp. 281, 284–85 (1990) (noting that Commissioner need not show that unused capacity supports affirmative determination so long as other economic factors support threat finding).

In finding that German imports will likely have a suppressing or depressing effect on U.S. prices in the immediate future, the Commissioners relied upon evidence that (1) German average import prices declined steadily, (2) pricing comparisons showed more instances of underselling (71) than overselling (64), and (3) many products were fungible commodity grade products, as compared to those of Japan, and, thus, were directly competitive with domestic products. *Final Det.* at 134. First, the court disagrees with Thyssen that because its AUVs were higher than U.S. prices, the Commissioners' finding is unsupported by substantial evidence. Germany's AUVs for its imports declined steadily, and at a much more rapid rate than did domestic prices. *Compare* Pub. Staff Rpt. at I–138 tbl. 95 *with id.* at I–55 tbl. 16. Further, as the court noted in its discussion of The Netherlands, *supra,* the use of individual country AUVs does not compel the court to find pricing comparisons inadequate.[39]

Second, Thyssen's product-by-product analysis of pricing comparisons does not convince the court to find that the Commissioners' reliance on generally more instances of underselling than overselling was unreasonable. Finally, Thyssen does not contest the Commissioners' finding that German imports were concentrated in relatively fungible commodity grade products. Based on these factors, taken as a whole, the court does not find the Commissioners' finding that German imports will likely have a suppressing or depressing effect on U.S. prices to be unsupported by substantial evidence.

The court rejects Thyssen's contention that the Commissioners improperly relied on increasing inventories in Germany, rather than "in the United States," as directed by the statute. *See* 19 U.S.C. § 1677(7)(F)(i)(V). "The provision directing the Commission to consider inventories in the United States does not preclude consideration of 'other relevant economic factors.'" *Citrosuco Paulista,* 12 CIT at 1225, 704 F. Supp. at 1099 (quoting 19 U.S.C. § 1677(7)(F)(i) (Supp. IV 1986)). Further, the court disagrees with Thyssen that the projected increase in inventories cannot serve as an "indicia of threat," because they were below 1990 and 1991 levels. *See* Conf. Staff Rpt. at I–180 tbl. 70. The issue is how this data is considered in the context of other data.

Thyssen also challenges the Commissioners' finding that German production of corrosion-resistant products was likely to be shifted to the

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[39] Thyssen argues that the AUVs utilized by the Commission do not allow price comparisons at the same level of competition in the United States. Thyssen's Reply Br. at 15 & n.9. Thyssen does not explain why the "landed, duty paid values" used to calculate AUVs are not probative.

U.S. in the form of cold-rolled exports. *Final Det.* at 134–35. The Commission noted that German exports of corrosion-resistant steel to the United States were projected to decline in 1993. *Id.* The Commissioners also noted that "[t]he increase in German production of corrosion-resistant products between 1990 to 1992 was accounted for almost exclusively by increases in sales in the U.S. market." *Id.* at 134. Thyssen argues that this statement is inaccurate and thus this finding is unsupported by substantial evidence. Defendant has admitted that this statement is incorrect. The increase in German production of corrosion-resistant steel was primarily accounted for by increases in sales to the German home market, rather than the United States. *See* Conf. Staff Rpt. at I–182 tbl. 71. The court, however, does not find this error to be significant as the Commissioners did not rely heavily on this factor. The Commission qualified its product shifting discussion by stating that "we regard the other evidence of threat to be a sufficient basis to make an affirmative threat finding in this case." *Final Det.* at 135.

Finally, Thyssen contends that Commissioners' discussion of the potential negative effects German imports will have on existing development and production efforts of the domestic industry is inconsistent with the same discussion as to Canada. The court disagrees. The Commissioners based their conclusions, in part, on their findings that Canadian imports were small in volume and, thus, neither were they a factor in the decline of domestic capital expenditures nor were they "likely to contribute to further declines." *Id.* at 143. In contrast, the Commissioners' noted the size and nature of German imports, as well as the potential for German imports to rise to injurious levels. *Id.* at 135. Based on these facts, the commission found German imports to be potentially harmful to planned improvements to be commenced or completed by the domestic industry beginning in 1993. *Id.* The court does not find the Commissioners' findings to be inconsistent.

Based on the record taken as a whole, the court finds the affirmative threat determination for Germany by Commissioners Rohr and Watson to be supported by substantial evidence in the record.

b. Determinations by Commissioners Newquist and Nuzum

Thyssen contends that Commissioner Nuzum improperly cumulated German imports with the other subject imports. Thyssen contends that sufficient disparities existed "between cumulated data and German data for those factors which Commissioner Nuzum deemed most relevant in reaching an affirmative determination." Thyssen's Mot. J. Agency R. at 47.

The thrust of Thyssen's argument however, is misguided. Thyssen argues that based on the statutory threat factors, Canada is more of a threat of material injury than Germany, thus Commissioner Nuzum erred in cumulating German imports. Commissioner Nuzum, however, in exercising her discretion to cumulate, based her decision on a limited number of factors. Most important of these was the fact that the cold-rolled countries that were cumulated exhibited significant adverse price

effects. On this basis, Canada was not cumulated. *See* discussion of Canada, *supra*, at pp. 37–40. Germany, on the other hand, had a majority of underselling and declining price trends. *Final Det.* at 133–34. Thus, the court finds that Commissioner Nuzum reasonably exercised her discretion in cumulating German imports.

Thyssen also challenges Commissioner Newquist's affirmative threat finding for Germany, contending that his findings are not supported by substantial evidence on the record. First, Thyssen's challenge to Commissioner Newquist's consideration of the capital markets is rejected. *See* discussion of Korea, *supra,* at pp. 46–48. Second, Thyssen's challenge to Commissioner Newquist's affirmative threat determinations for the cumulated imports is made on much the same grounds as Dongbu's (Korea). In its discussion concerning Korea the court found that Commissioner Newquist's affirmative threat determination with regard to the cumulated countries, including Germany was supported by substantial evidence. Thyssen's arguments do not compel a different result. Based on the record taken as a whole, the court finds the affirmative threat determination for Germany by Commissioners Nuzum and Newquist to be supported by substantial evidence in the record.

CONCLUSION

In conclusion, petitioners have failed to demonstrate prejudicial error as to the negative aspects of the Commission's injury determination. The findings are supported by substantial evidence and are sustained. The Commission's affirmative threat determinations for Korea, The Netherlands and Germany are similarly supported and are sustained.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/7 1/23/95 Aquilino, J.	Benteler Industries, Inc.	90–04–00161	7304.90.7000–4 7.5%	8708.99.50 3.1%	Agreed statement of facts	Baltimore Tubular sections of BTR 110
C95/8 1/23/95 Aquilino, J.	Benteler Industries, Inc.	90–04–00162	7304.59.80 7.5%	8708.99.50 3.1%	Agreed statement of facts	Detroit Tubular sections of BTR 110
C95/9 1/23/95 Aquilino, J.	Benteler Industries, Inc.	91–10–00763	7304.59.80 7.5%	8708.99.50 3.1%	Agreed statement of facts	Detroit Tubular sections of BTR 110
C95/10 1/23/95 Aquilino, J.	Benteler Corporation	93–10–00693	7304.59.80 7.5%	8708.99.50 3.1%	Agreed statement of facts	Cleveland Tubular sections of BTR 110
C95/11 1/23/95 Aquilino, J.	Benteler Industries, Inc.	92–11–00734	7304.90.7000–4 7.5%	8708.99.50 3.1%	Agreed statement of facts	Detroit Tubular sections of BTR 110
C95/12 1/23/95 Aquilino, J.	Benteler Corporation	93–12–00789	7304.59.80 7.5%	8708.99.50 3.1%	Agreed statement of facts	Detroit Tubular sections of BTR 110
C95/13 1/23/95 Aquilino, J.	Benteler Corporation	94–01–00058	7304.59.80 7.5%	8708.99.50 3.1%	Agreed statement of facts	Chicago Tubular sections of BTR 110
C95/14 1/23/95 Aquilino, J.	Hosiden America Corporation	93–07–00407, etc.	9013.80.60 9%	8531.20.00 2.7%	Agreed statement of facts	Los Angeles and San Francisco Various models of custom-made liquid crystal displays
C95/15 1/23/95 Aquilino, J.	McCrory Stores, Division of McCrory Corp.	93–06–00375	6110.20.20 20.7%	6108.31.00 9%	Agreed statement of facts	Baltimore Women's cotton garments called "dorm shirts"
C95/16 1/23/95 Aquilino, J.	Ruby Internatiuonal Inc.	91–04–00247	715.05, 716.27, 716.29, 720.24, and 720.28 17% + 36¢	688.45 Various rates	Belfont Sales Corp. *v.* United States 878 F.2d 1413 (Fed. Cir. 1989)	Miami Quartz analog watches

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/17 1/27/95 Goldberg, J.	Mitsubishi Electronics America, Inc.	92–03–00190	8517.81.00 8.5%	8541.40.20 2%	Agreed statement of facts	San Francisco Laser diode modules

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